85-883

No.....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

JOHN R. (BOB) PARK d/b/a
ACTION REAL ESTATE

Petitioner-Plaintiff,

vs.

EL PASO BOARD OF REALTORS, ET AL.,

Respondents-Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether there was evidence sufficient to sustain a Judgment based on a jury finding of participation by the El Paso Board of Realtors in a boycott and a price-fixing conspiracy, and whether the Court of Appeals ignored the "slight evidence" rule applicable to co-conspirators in assessing the evidence?

2. Whether a Judgment based on jury findings of participation by individual realtors in a boycott and a pricing fixing conspiracy should have been reversed because the trial court made the finding that a proper foundation had been laid for admission of evidence under the co-conspirator rule, Fed.R.Evid. 801(d)(2)(E), then, by instruction, required the jury to again determine admissibility of the evidence before considering it?

3. Whether there was a rational basis for assumptions of market penetration and profit margin in an expert's damage study in a boycott and price-fixing conspiracy case?

4. Whether the Plaintiff in a price-fixing and boycott case failed to prove that he had been injured by the price-fixing and was properly denied recovery against Defendants found to have participated only in the price-fixing consipracy?

PARTIES TO THE PROCEEDING BELOW

The Plaintiff-Appellee below is John R. (Bob) Park, a natural person.

The Defendants-Appellants are:

1. El Paso Board of Realtors, is a non-profit corporation, and the associations to which it belongs, the National Association of Realtors and the Texas Association of Realtors;
2. Donald M. Love, Jr., is a natural person;
3. Mark I Realty, Inc., a corporation;
4. Moorhead, Inc., a corporation;
5. C & H Realty, Inc., a corporation;
6. E. Dempsey Gunaca, a natural person;
7. Bruce B. Shields, a natural person;
8. Raymond Baca, a natural person;
9. Wayne L. Moorhead, a natural person;
10. Cecil D. Clark, a natural person; and
11. Ralph K. Tutor, a natural person.

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The Petitioner JOHN R. (BOB) PARK d/b/a ACTION REAL ESTATE respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding.

REFERENCE TO OPINIONS

The judgment of the United States District Court for the Western District of Texas, El Paso Division, dated December 23, 1982, was not reported and is reproduced as Appendix A.

The original opinion of the United States Court of Appeals for the Fifth Circuit is reported at — F.2d —, 1985-2 Trade Cases ¶ 66,659, and is reproduced as Appendix B, and its Judgment is Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on June 24, 1985. Rehearing was denied on August 14, 1985, and this petition for certiorari was timely filed thereafter. This Court has jurisdiction pursuant to 28 U.S.C. §§ 2101 and 1254(1).

STATUTORY PROVISION

Section 1 of the Sherman Act, 15 U.S.C. § 1, states in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 4 of the Clayton Act, 15 U.S.C. § 15, states in pertinent part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fees."

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STATEMENT OF THE CASE

(i.) Course of proceedings and disposition in the Court below.

On August 23, 1978, Plaintiff John R. (Bob) Park d/b/a Action Real Estate filed suit against over sixty (60) Defendants and certain co-conspirators alleging price-fixing, boycott, and unreasonable restraint of trade in the real estate brokerage business in El Paso County, Texas. R. Vol. 1, inst. 1, p. 319.

On October 25, 1982, the case went to trial against eighteen (18) remaining Defendants. R. Vol. 1, docket entry 10/25/82. On November 10, 1982, directed verdicts were granted in favor of six (6) Defendants, R. Vol. 8, inst.'s 579-84, pgs. 2196-2201, from which no appeal was

taken. On Nov. 19, 1982, a jury verdict was returned which found that all twelve (12) remaining Defendants participated in a price-fixing conspiracy, and that six (6) of them were also participants in a boycott conspiracy. R. Vol. 8, inst. 594, pgs. 2142-44.

The trial court entered judgment against the Defendants found guilty of both price-fixing and boycott, (R. Vol. 8, inst. 599, pgs. 2081-5), all of whom appealed except one. R. Vol. 8, inst. 605, pgs. 2059-60. The court declined to enter judgment against the remaining Defendants, and Plaintiff cross-appealed. R. Vol. 8, inst. 608, pgs. 2051-2.

On June 24, 1985, the Fifth Circuit Court of Appeals issued its opinion affirming the trial court's refusal to enter judgment against those Defendants found guilty of participating only in the price-fixing conspiracy, reversed and rendered in favor of the Defendant El Paso Board of Realtors, and reversed and remanded for re-trial as to the remaining Defendants.

(ii.) Statement of facts

The Board and the Market

The El Paso Board of Realtors is an affiliate member of the Texas Association of Realtors (TAR) and the National Association of Realtors (NAR), Dx.I, p. 1. It is the only such Board in the El Paso area, R. 41, and offers the only multiple listing service for residential real estate listings in the area. R. 51. Approximately 80% of all resi-

dential real estate sold by owners in El Paso County are sold through the Board's MLS. R. 76-78, 1228-30. Each year, there are several thousand listings sold through the MLS with sales totaling as high as a quarter of a billion dollars R. 75-80. At the time of trial, there were approximately 275 listing brokers in the MLS, with total membership of approximately 2,000 brokers and salesmen. R. 155.

The NAR prohibits the Board's MLS from accepting "open" listings (where a commission is paid only to the agent who finds the buyer), R. 53-54, and the Board refuses to accept "agency" listings (where the owner retains the right to sell without having to pay a commission, but must pay if a sale is procured by an agent) R. 54. The MLS contains only "exclusive" listings (where the commission must be paid regardless of who sells the property during the term of its listing), R. 52, and all listings obtained by members are required to be published in the MLS unless the broker's client signs a statement that he doesn't want it published. R. 55.

The MLS is the most effective way for a seller to obtain exposure of his home to potential buyers. R. 1230. It also allows detection of price-cutters through instantaneous exchange of price information. R. 68-69.

Price Fixing

Dennis Wagner, one of the "deans" of the real estate business in El Paso, R. 1812, openly admitted that the El Paso Board of Realtors® had been guilty of price-fiixng.

R. 1813, 1827. The realtors® reasoned that "lawyers were price-fixing and the doctors were price-fixing so the real estate agents might as well do it." R. 1813. Following this logic, the MLS Committee of the El Paso Board of Realtors® ("Board") enacted RULE 2-E of the Rules and Regulations of the MLS on April 13, 1966, which provided:

> "No listing shall be accepted by the Service when said listing provides for a commission of less than six percent." (Px. 53, p. 4; Px. 428, tab 11.)

The April 13, 1966, amendment to RULE 2, codified and continued a policy and practice already in effect. The 1959 Bylaws of the Board "recommended" a "standard" commission of "not less than six percent of the gross selling price, whatever that may be, but may be more under special agreement." Px. 428, tab 13, *Bylaws of the El Paso Board of Realtors®*, Art. XVI, Sec. 2(A) and (B).

The MLS Rules and Regulations of the era also specified the division of commissions to be made on "cross-sales", i.e., sales by a selling agent of property listed in the MLS by a listing agent. Px. 428, tab 12, "Multiple Listing Service — Rules and Regulations", p. 4. These mandatory division percentages were changed slightly when the Board reorganized the MLS as "completely" a Board operation and called it "Realtors® Listing Service ("RLS"). Px. 428, tab 12, ltr. dtd. Oct. 5, 1961.

The time of origin of this openly admitted price-fixing practice was not established. Earlier bylaws and rules were not located, and Wagner did not fix the time. It ap-

pears, however, that the Board controlled both commission rates and cross-sale fee division virtually from the inception of the MLS in 1952, R. 167, until the late 60's or early 70's, when efforts were made to eliminate evidence of the "official" price-fixing policy.[1]

The rules and regulations of the RLS enacted Jan. 20, 1971, eliminated paragraph E from Rule 2. Dx. J, pgs. 3-4. On May 29, 1971, Board officer Roy Hovious wrote to Mitchell Landers, Chairman of the "RLS" Committee, informing him that as a result of increasing pressure brought against real estate boards by the Justice Department, a letter had been written at the instigation of the NAREB[2] to all real estate board officers of Texas requesting that "no By-laws or forms should show the division of commissions between broker firms."

A short time later, (on June 25, 1971), A. A. Rivas, Executive Vice President of the Board, wrote all "RLS Brokers" telling them that they must indicate on the front side of listing contracts the commission split in the event of a cross-sale because the Board office staff "*CANNOT* write this information on your listing." The letter instructed the brokers to destroy all Rules and Regulations of the RLS in their possession and advise their associates to do likewise. Px. 428, tab 9.

At a meeting of the RLS directors on July 24, 1972, the directors "were made aware of the problems that the MLS systems are facing with the Justice Department and of the fact that our own rules and regulations are now being challenged by the State Association as well as the Na-

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[1] This is singularly remarkable, since the mandatory rates were held illegal in *U.S. v. NAREB*, 339 U.S. 1, 485, in 1950.

[2] National Association of Real Estate Boards, forerunner of the National Association of Realtors (NAR).

tional Association." Px. 428, tab 8. On July 1, 1977, the RLS directors voted to change the listing form by deleting the commission percentage and referring "to said amount as a service fee." Px. 428, tab 6. At a Board dinner meeting in June, 1977, Rivas advised members to start stating commissions in terms of dollars amount rather than as a percentage because of an investigation by the Attorney General. R. 2054-2958; 3046.

On April 16, 1980, after this suit was filed, the MLS[3] directors made it mandatory to delete the showing of the total commission charged by the listing broker on listing agreements filed with the Board. Px. 428, tab 4. The practice of showing the commission split was also discontinued. (R. Vol. 1, Inst. 1). R. 56. Prior to the suit being filed, if the total commission and the split were not shown, the listing would be rejected by the MLS. *Ibid.*

Although the price-fixing became more covert in the early 1970's, it continued unabated. Defendants offered no credible evidence that the price-fixing ceased, and there was no evidence of any affirmative act designed to end the practice. The changes in the Bylaws and MLS Rules proved only that written evidence of the price-fixing was removed. Rivas' letter shows that an attempt was made to destroy all existing written evidence of the practice, but its disclaimer of Board control over price is belied by the advice subsequently given (1977) by Rivas to state commissions in terms of dollar amounts rather than percentages in order to avoid an Attorney General's investigation.

Economic analysis of price behavior in the market confirmed the price fixing. Fourteen firms with records dat-

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[3] The MLS designation was restored sometime after Oct. 1, 1979, Dx. O, and is reflected in the rules and regulations of Jan. 23, 1981. Dx. P.

ing back as far as 1969 were selected for statistical sample analysis to determine price behavior in relation to market characteristics during the period 1969-1975, and to isolate and determine the significance of the time of change in the commission from six percent to seven percent, known to have occurred in August of 1969.[4] Px. 421(1)-(14); R. 2342-2355; R. 176, 195. Analysis of these records support the conclusion that the change in the commission was coordinated between competing firms. Px. 421(1). The percentage of the total listings examined for the period 1969-1975 which were listed at either six percent or seven percent commission fell below 95% (to 94.7%) in only one quarter (first qtr. 1974). Px. 422.

Even the basic forms the realtors® used to transact business during this period confirmed the price-fixing. Board members used listing and earnest money contract forms with the same commission preprinted.[5] One printed earnest money contract form described the commission as "the usual six percent" until the commission was raised to 7%, whereupon the form was changed to read "the usual seven percent commission." Px. 442.

The Board instituted a computerized listing service in mid-1975. Members received summarizations of listings updated weekly and compiled quarterly. R. 64, R. 666, Px. 1-19, Px. 434-437. The quarterly compilations were analyzed for the entire period that they reflect the listing commission. (July 1975, Px. 1, through Mar. 1980, Px. 19, R.

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[4] DeWitt and Rearick maintained a record indicating that effective at noon, August 20, 1969, its listing and selling commission was raised to seven percent (excluding existing listings). R. 195. Both DeWitt and Rearick and Wagner claim to be first to have raised the commission. R. 194; R. 1824.

[5] It was the practice of the Board to print listing contracts, and other forms for members, on order. R. 196.

56.) The percent of the total listed at seven percent was consistently above 96% in 1975 and 1976. Px. 422-7. It decreased slightly in the latter part of 1977, when the low was 94.1%. *Ibid.* It was in 1977 that Rivas warned the realtors® to state their commissions in dollar amounts rather than percentage.[6] In 1978, the percentage of the total listed above 7% remained above 90% until the third quarter of 1978, during which this suit was filed. *Ibid.* In 1979, the percent of the total listings at 7% ranged from 84.3% to 77% and in the first quarter of 1980 it was 75.9%.[7] *Ibid.*

Dr. Anthony George, an expert particularly well suited to make the analysis,[8] concluded (1) that though the structure of the residential real estate "resale" market in El Paso appeared competitive, it did not act competitive, R. 2388; (2) that there was no competitive activity in terms of pricing, R. 2389; (3) that prices were set artificially from 1969 forward and did not reflect what would naturally occur on a period to period basis, especially in a "short run," R. 2390; (4) that the pattern of pricing in El Paso, over the period it existed, would not occur by chance as in a free market, R. 2391; (5) that such a pattern has never been observed in a market where there is competition, R. 2243; (6) that there are pressures in a free market which will cause price variations and attempts to get a greater percentage of the market, which did not occur in El Paso,

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[6] Those stated in dollar amounts were not counted as "seven" percent listings, even though the dollar amount might have approximated or equaled seven percent of the sales price.

[7] Since the MLS directors ordered on April 16, 1980, that the total commissions on listings be deleted, there were no further quarterly listing summaries from which commission information could be obtained. See Px. 428, tab 4; R. 56.

[8] Dr. George is an economist and econometrician with a background in antitrust economics. R. 2230-32.

R. 2391; (7) that the deviations from total uniformity in pricing were so small as to be statistically insignificant, R. 2378; and (8) that the pattern was consistent only with agreement among the parties involved, and could not be the result of natural market phenomena. R. 2395.

Considerable additional evidence corroborated Dr. George's opinion, much of which was in the form of statements by Board members confirming the existence of the price-fixing. See: R. 1240, 1460, 1558, 2214, 3713, R. 1247-48, Pxs. 421(1)-(14), 442, R. 2213-15, R. 1876-77, 1558, R. 1558, R. 1519, R. 1527, R. 1530, R. 1531, R. 1190, R. 1191-93, R. 1460-63, R. 1892, R. 1893, R. 1186, R. 1192-93, R. 1460, R. 1462, R. 1170-71, R. 1171-72, R. 1211-12, R. 1172, R. 1892, R. 1893, R. 1894, R. 1889, R. 2155-56, R. 2156, R. 3011-15.

The Court of Appeals did not question the jury finding that all Defendants participated in the price-fixing. The purpose of this review of price-fixing evidence is to show the dominant role of the Board in the stabilization and maintenance of the commission and "split" rates. Since the price-fixing and boycott have a cause and effect relationship, evidence of price-fixing by the Board is strong evidence of its liability for the boycott of Mr. Park.

Boycott of Bob Park

In Jan. 1975, John Robert (Bob) Park, a licensed real estate broker, established Action Real Estate ("Action") in El Paso, Texas. R. 265. He initially charged a "flat fee" of $550.00 as commission on "resales."[9] R. 266. Since he saw no relation between the work and expense involved in selling a home and its price.[10] *Ibid.* Park did not at first

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[9] Sale of a pre-owned, as opposed to a newly constructed, residence.

[10] This view found support among members of the Board. See Testimony of Paul R. Compton, R. 1884.

join the Board, feeling that he did not need to be a member and that he would have problems with the Board because he was a "price-cutter." R. 267. However, he found that not being able to participate in the Board's listing service ("MLS") was such a detriment that it was almost impossible to operate and not be a member.[11] R. 267-8.

After opening the Action office, Park distributed flyers advertising his flat-fee "commission." R. 972-4; 1441, 1567-8, Px. 420, tab 1.[12] From that point forward Park encountered a variety of harassing and coercive tactics by members of the Board designed to force him to change his pricing practices, or to force him out of the Board and out of business. These acts are not discussed in detail in this Petition, but are collated in Appellee's Brief, pgs. 3-28. They consisted of refusals to deal, "steering" (directing clients away from Park and Action), "punitive splits" (refusal to split commissions on cross-sales with Park as advertised by the MLS listings because of Park's commission rate), "commission changes" (changing Park's advertised

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[11] Membership in the Board was required in order to participate in the MLS, Dx-O, p. 13; Dx-P, p. 1. The MLS provided exposure of Action listings to members of the Board, a "sales digest" useful in placing values on properties, and an "inventory" of listings. R. 268. Sales resistance was encountered based on a belief by the public that it was almost impossible to sell homes without the aid of the MLS. R. 273.

[12] The initial fee was $550.00. It was increased in increments until it reached $950.00 in 1979. R. 266, 719.

commission rate to the standard 7% on earnest money contracts submitted on Park's listings), harrassment, disparagement, and interference.

The Court of Appeals expressly upheld the finding of the existence of a boycott and observed in the opening paragraph of its opinion:

> "Owning one's own home may be the great American dream, but buying it often has more the quality of a nightmare. As the record in this case reveals, the real estate business, like the Hobbesian state of nature, can be nasty, brutish, and short. While many—indeed most—real estate brokers ply their trade honestly, relying on skill and hard work to earn their daily bread, some resort to more dubious tactics to gain an advantage over their competitors. The question that this case presents is whether the admittedly dubious tactics of the defendant-brokers also violated federal antitrust law."

The punitive acts directed against Park were designed to compel him to "get in line" on pricing. These "nasty, brutish and short" and "admittedly dubious" practices performed by Board members, a number of whom were past or present officers of the Board, justify the conclusion that the boycott was designed to maintain the price-fixing

implemented through the Board, and support the jury finding that the Board participated in the boycott.

There was also other significant evidence of direct involvement by the Board in the boycott.

Professional Standards Committee ("PSC")

The PSC is a standing committee of the Board. Dx. G, p. 12, Dx. I, p. 14. It adjudicates complaints against board members. In practice, it serves as an "investigator, prosecutor, judge, and jury." R. 1309-10. Its use, or misuse, was perhaps the most effective weapon against Park.

Ristom Complaints

Action's introductory flyer advertised its service and price. It prompted the first complaint. Robert Ristom, Investors agent, claimed the flyers were likely to interfere with existing listing contracts and demanded Park be censured and the solicitation stopped "immediately" Px. 420, tab 1, ltr. Feb. 2, 1977.[13] The PSC responded that legal counsel had advised that "Parks" (sic) "is within his rights," but the door was left open to further prosecution of the complaint. Px. 420, tab 1, ltr. Feb. 23, 1977.

On Oct. 26, 1977, Ristom filed another complaint involving an Action listing (9074 Nottingham). Px. 420, tab 3, ltr. Oct. 26, 1977.[14] He claimed that Investors had obtained an offer on the property, and informed Park of the offer, and that Action interfered with the presentation of a contract. *Ibid.*[15]

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[13] The flyer contained a disclaimer of solicitation of listed property. Px. 420, tab 1, flyer. Ristom called the disclaimer an "effort to avoid objections."

[14] For reasons never explained, PSC records show that the complaint, Case No. 78-6, was "received" Jan. 26, 1978. Px. 420, tab 2, case summary sheet.

[15] The complaint letter did not specify any specific act of interference or any specific ethics violation.

The complaint record shows that Action was working with both the buyers and the sellers, and was directed to prepare a contract according to terms agreed between them privately, when notified that Investors had an offer from an unidentified buyer. *op. cit.*, statements by O'Connor and Park. Park informed the seller, Martinez, that another offer was forthcoming, then called the buyers (Zamoras) to inform them that the requested contract was ready for signature. *Ibid.* Mr. Zamora said he was "confused" because his wife was talking to another real estate person. *Ibid.* Mr. Zamora later called back, made an appointment, and he and his wife signed the Action contract and put up the earnest money. *Ibid.*

Martinez said that before he heard about another offer, the sales agreement had been made with the Zamoras and Action had been directed to prepare the contract. Later, Mrs. Zamora returned to his home with an agent whom she introduced as a friend. After that, Park called him and said a contract would be forthcoming from another agent. Martinez then told Zamora that he would not accept a contract from another agent on the terms that had been agreed. Zamora apologized, *op. cit.*, Martinez statement, and withdrew the Investors' contract, with Investors consent. *op. cit.*, Zamora statement.

The sale closed in accord with the Action contract. No other contract was ever presented. Neither Park nor O'Connor ever saw another contract until long after this suit was filed. *op. cit.*, Park and O'Connor statements. The Chairman of the PSC when the complaint was presented said no contract was furnished to the PSC. R. 2906. Park stated that if a contract had been submitted, it would have been presented. *op. cit.*, Park statement.

The complaint lay idle for months, then was investigated.[16] The investigator reported Mar. 7, 1978, and "deferred any recommendations to the [PSC]" and "discussion of the case failed to produce any motions." The PSC then appointed "a member" to work with the investigator on the case for "re-presentation at a later meeting." Px. 429, p. 57.

On Apr. 11, 1978, the PSC found Action in violation of Art. 4 of the Code of Ethics, which says realtors® should seek no unfair advantage over other realtors® and conduct business so as to avoid controversy, Dx. D, because: "Action had influenced both buyer and seller." Px. 429, p. 43. Park and O'Connor were reprimanded. Px. 420, tab 3, ltr. Apr. 25, 1978.

Park Rule

Significantly, on Mar. 14, 1978, it was reported that a "prior offense record" had been established to be used by the Committee to assess "a reasonable punitive measure." Px. 429, p. 47. The PSC delayed action on the Ristom complaint, then found Park guilty after passage of this rule and noted on the Ristom "case summary" "no previous considered." Px. 420. Considering these and the following circumstances, the "prior offense record" may well be called the "Park Rule."

Gunaca Complaint

The Gunaca complaint, pending when the Ristom complaint was decided, arose out of a transaction in which Arrow Pres. Gunaca imposed a "punitive split." See pgs. 12-13, *supra*. Park acceded to the commission change, following a confrontation with Gunaca, R. 325-329, and the

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[16] Mr. Boyaki, an attorney and client of Action, was present when Park was interviewed, and said the investigator had "no idea what the complaint was." R. 1087; see also R. 463.

contract was presented. During the presentation, the Arrow agent, Deaner, asked for private conference with the Heredias (sellers). Park objected, because this would be in violation of the right of the selling agent to be present when a contract is presented. Dx-P, p. 4, sec. 4; R. 378. After presentment, the Heredias rejected the contract; Park asked a second time if it would be accepted, and the Heredias responded "no." Px. 420, Report May 2, 1978, ltr. June 7, 1978. Park left. *Ibid;* R. 3222. Neither the Heredias nor the Arrow agent stated they did not understand the offer or asked for time to consider it, and no one contacted Park after the presentation. Px. 420, ltr. June 7, 1978.

After the presentation, Gunaca dictated a statement, obtained the Heredias' signature, and filed the complaint. R. 1627, 3222.

Heredia said he didn't want to pursue the contract any further after the presentation. R. 3222. The potential buyer, Boyaki, said he would not have closed because of the change in the division of the Commission. R. 1085.[17]

Construing the "record" most favorably to Gunaca, the only thing of which Park could be accused was rudeness; in fact, Heredia, who was not aware of Gunaca's earlier confrontation of Park, testified that rudeness was his only complaint. R. 3223. But Gunaca, *who was a member of the PSC*, was allowed to be present while the com-

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[17] The contract would have amounted to a counter-offer had it been signed by Heredia, and need not have been accepted. This was the position taken by Board's counsel with reference to a "commission change" (by Bonded, listing on 10917 Brownfield), i.e., if Park changed the commission in the contract to conform to the listing, a counter-offer would result which did not have to be accepted. R. 539-40. The Board's position with reference to the punitive split by Gunaca was obviously different.

plaint was considered, Px. 429, p. 39-40, and diligently attempted to "punish" Mr. Park. R. 1632-39. He took violent exception to the first investigation report, which questioned the veracity of Heredia's statement because it was prepared by Gunaca, R. 1047, and "resigned" from the PSC in protest. Px. 429, p. 35. Since Gunaca "felt the case was not investigated well," *Ibid*, it was "reassigned to Ray Baca for disposition." *Ibid.*

Baca also found the Heredias' statement "exaggerated." R. 1350, 1392, 1384, 1396. He told Park in the second investigation interview May 24, 1978, R. 343, 415, Px. 3030, that the "odds" were "stacked" against Park on the PSC because of the way he charged, i.e., his commission. R. 1403, and that this was Gunaca's reason for filing the complaint. R. 1384. Nevertheless, Baca recommended that Park be found in violation of Art. 7 of the Code of Ethics (holding sellers' interest above all others). Px. 429, p. 35. Park was "reprimanded" by *letter dated May 9, 1978,* which was *fifteen days before Baca interviewed him and 28 days before the PSC meeting which "accepted" Baca's report.* See Px. 288, Px. 420, tab 4, ltr. May 9, 1978.

The finding was based solely on the Heredias "very subjective" opinion that they "didn't have time to consider the offer." R. 1409.[18] The PSC was critical of Gunaca's actions, finding him "just as culpable" as Park, R. 1328, but Gunaca was found guilty of no offense and acquired no "prior offense record," while Park added "strike two" to his. R. 1339.

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[18] This is contrary to the PSC findings in the Chairman's letter to Gunaca dated June 7, 1978, Px. 420, tab 4, to Heredia's statement that he would not pursue the offer even after fully understanding it, R. 3223, and the first investigator's report (May 2, 1978) which pointed out that Park twice asked Heredia if he would accept the contract. Px. 420, tab 4.

Hicks Complaint

In the last complaint against Park, filed May 8, 1978, Steve Hicks, Future agent, accused Park of calling Hicks' former client, Penney, and asking him to join as a plaintiff in a suit against Future for misrepresentation. Px. 420, tab 5, ltr. May 8, 1978. Mrs. Penney alleged in an unsworn statement that Park made "vague comments" about making three times the amount of money "made on the sale" of her home (10612 Riverwood) and asked the Penneys to join in a lawsuit against Future, because Action was not allowed to have anyone present when Action's contract was presented[19] (which is a violation of Board rules). *Ibid*, ltr. June 22, 1978.

Hicks admitted that the complaint should not have been filed, R. 2161-62, and that he had caused the commission split in the contract submitted to the Penneys to be changed, so as to penalize Action. Px. 429, tab 6, ltr. Aug. 7, 1978. The PSC investigator told Park she didn't understand the allegations. R. 585. Regardless, on July 11, 1978, the PSC found Park guilty of an ethics violation. Px. 429, p. 32. The minutes of this meeting contain the following significant statements:

> "The Committee agreed that any admonishment to Park must be well sighted (sic) and documented. He was found in violation of Article 23 [disparaging the business of another competitor]. Carried, one abstaining.
>
> "Previous offense file showed two other cases where Park was found in violation of the Code of Ethics. The recommendation was to send the case to Ainsa and with approval then send to the Court of Ethics." *Ibid.*

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[19] Mrs. Penney's unsworn statement says an Action agent was present when the contract was presented. Mr. Green testified to the contrary. R. 1911. The transaction involved a "punitive split," and did not close. R. 1908-1910.

The Board's attorney, Ainsa, was consulted and it was decided to refer Park to the Court of Ethics under the "prior offense" (Park) rule. R. 444-45; Px. 343. If found "guilty" Park faced a fine up to $300.00, probation for any period specified, suspension, or expulsion from the Board, or "any combination thereof." R. 447. If suspended, Park would not be allowed to participate in the MLS or any other Board activity. R. 448.

The stage was thus set to deny Park Board membership and access to MLS. The only thing that prevented this occurrence was the filing of this suit on Aug. 23, 1978. At the meeting of the PSC on Sept. 5, 1978:

> "The attorneys hired by the Board advised all members to keep silent about the case because anything could have legal backlash. Everything in the PSC files concerning Action are to be given to Mr. Ainsa. Any cases currently on active file are going to be investigated but no action taken without advice of counsel." Px. 429, p. 25.

At the meeting of Oct. 7, 1978:

> "Mr. Ainsa advised the committee concerning all Action cases not to proceed at all. Most members are uneasy investigating cases involving Action in that all committee records concerning Action may be subpoenaed." Px. 429, p. 20.

The Board is thus awaiting disposition of this suit to proceed with the "Court of Ethics" action. Once that point is reached, the decision of the Court of Ethics is entirely predictable.

REASONS FOR GRANTING THE WRIT

I. The evidence supports the finding of the Board's participation in and condonation of the boycott.

A. Only slight evidence is necessary to connect an individual conspirator to a conspiracy.

Only slight evidence is needed to connect an individual conspirator to a conspiracy. *Morton Salt v. U.S.*, 235 F.2d

573 (10th Cir. 1956); *Riss and Co. v. Ass'n of Am. RRD's.*, 187 F.Supp. 306, 313 (D.C. D.C. 1960). This proposition has been repeatedly affirmed in the context of criminal cases in which the burden of proof is the more exacting "beyond a reasonable doubt" rather than the simple "preponderance of the evidence" test applicable in civil cases. See, *e.g.*, the following Fifth Circuit cases: *U.S. v. Archbold-Newball*, 554 F.2d 665, 676 (5th Cir. 1977), cert. denied 434 U.S. 1000; *United States v. Craveru*, 545 F.2d 406, 418-19 (5th Cir. 1976), pet. for reh. den., 545 F.2d 420, cert. denied, 429 U.S. 1100, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977); *United States v. Lawson*, 523 F.2d 804, 806 (5th Cir. 1975); *Park v. Huff*, 506 F.2d 849, 859 (5th Cir. 1975) (*en banc*), cert. denied, 423 U.S. 824, 96 S.Ct. 38, 46 L.Ed.2d 40 (1975); *United States v. Oliva*, 497 F.2d 130, 133 (5th Cir. 1974).

The evidence linking the Board to the boycott is more than "slight."

B. The Court of Appeals failed to consider all the evidence linking the Board to the conspiracy.

In the words of the Court at Slip Op. 4985: "Given both the separate jury finding that a price-fixing conspiracy existed and the evidence of a widespread parallel conduct, we believe that this is a setting where common action bespeaks accord. . . . To support . . . an inference [that the Board participated in the boycott conspiracy], Park needed to introduce evidence that the Board participated in or condoned the alleged rules violations."

In part II. B. 1. of the Opinion, the Court analyzes some of the evidence against the Board. It discusses (1) the action of the Board on the one complaint made by Park, (2) the disposition of the four complaints brought

against Park by other realtors, (3) portions of a tape conversation with Raymond Baca, Vice Chairman of the Board's Professional Standards Committee, and (4) the adoption of the "prior offense" rule. Petitioner disagrees with the Court's conclusion that these circumstances fail to show the requisite evidence of the Board's participation in or condonation of the boycott by the Board's members and officers. However, there is considerable additional evidence of the Board's involvement in the conspiracy which is omitted from the Court's discussion and which, when viewed in the totality of the circumstances, provides ample support for the jury verdict and trial court judgment against the Board.

The Board subjected Mr. Park to contrary and inconsistent legal interpretations as to whether a "commission change" amounts to a counter-offer. Each time, the conflicting rulings favored the realtor with which Mr. Park was involved in a dispute. (See footnote 17, above.)

When Bonded Realty made a "commission change" in a contract submitted for a buyer on an Action listing (10917 Brownfield), the Board's attorney, Mr. Ainsa,[20] ruled that if Park changed the commission in the contract to conform to his listing for the seller in MLS, a counter-offer would result and the buyer would not be bound by the contract. 10 Rec. 539-40. However, when Mr. Park contended that when Gunaca and King changed the commission in the contract he submitted on Gunaca's listing of the Heredia property on Bert Yancey Street a counter-offer resulted which had to be accepted by the buyer, the

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[20] Mr. Ainsa was directly involved in the processing of the ethics complaints, the referral of Mr. Park to the Court of Ethics under the Board's newly formulated version of the "habitual offender" rule, and the decision to suspend final processing of the complaints after this lawsuit was filed.

Board took the position that the commission change did not affect the buyer and was not a counter-offer. 10 Rec. 539-40.

By making the ruling in favor of Bonded, the Board condoned the commission change practice which was a dominant feature of the boycott against Park by Board members, and short-circuited any complaint about the practice by Park. Yet when Gunaca filed the complaint against Park, the Board ignored the fact that the commission change was not approved by the buyer. Thus, the Board implicity ruled that the commission change was not a counter-offer. Otherwise, no effective presentation to the seller could have taken place until the buyer approved the change. Since the buyer would not have approved it, 14 Rec. 1073, et. seq., presentation to the seller and sufficient time to consider the buyer's offer would have been moot points. Park thus could not have been convicted of the Gunaca complaint had the Board not taken inconsistent and discriminatory positions.

The handling of the Gunaca complaint against Park was riddled with other irregularities. Gunaca, a member of the PSC, was allowed to sit in judgment of his own complaint. 10 Rec. 347. Gunaca was found "equally at fault" with Park, but was not found guilty of an ethics violation. Cecil Clark, Chairman of the PSC wrote to Mr. Park on May 9, 1978, stating that the investigation of the complaint had been completed, and that Mr. Park had been found guilty of violation of Art. 7 of the Code of the Ethics. 10 Rec. 334-35. At that time no investigator for the committee had even interviewed Mr. Park personally. *Ibid.* On May 24, 1978, Ray Baca, Vice Chairman of the PSC, interviewed Mr. Park at length about the same complaint. 10 Rec. 337. A second letter by Cecil Clark was written

June 7, 1978, to Gunaca advising that Mr. Park had been found guilty, 10 Rec. 338-341, but Mr. Park never received any letter advising of the finding other than the May 9th letter. 10 Rec. 341. These circumstances support an inference that Mr. Park was found guilty first, then judged later by a tribunal which was biased and included the accuser.

The importance of the Gunaca complaint cannot be underestimated. It set in place the mechanism for infliction of harsh penalties on Mr. Park, including expulsion from the Board and MLS. Though the Court of Appeals cautions that we cannot "second guess" what the Court of Ethics will do now that it may be free to act, it is clear that Mr. Park was placed in this vulnerable position through abuse of the Committee's procedures, the bad faith of its members, and inconsistent and discriminatory interpretations by the Board.

The other complaints against Park were tainted by the same type of abuse. Mrs. Jarma, investigator for the PSC in the case of the Hicks complaint, told Mr. Park that she did not understand the nature of the allegation made against him, 11 Rec. 585. Hicks admitted that the complaint should never have been filed. 18 Rec. 2161-62. Yet the decision was made to take the Hicks complaint against Park to the Court of Ethics, without a quorum being present, after consultation with Board attorney Ainsa. 11 Rec. 444-55. Hicks was purportedly found guilty of violating Art.'s 4 and 7 of the Realtors' Code of Ethics in response to Mr. Park's complaint, after this suit was filed, but the letter which so states was never mailed, Mr. Hicks was never advised, and Hicks was never referred to the Court of Ethics. 11 Rec. 563-564.

Gunaca wrote Mr. Park a "punitive split" letter, i.e., a letter advising Mr. Park that if Park sold one of Gunaca's listing, the fee would not be split as advertised in the MLS. Though Gunaca made this known to the Board, he was allowed to sit in judgment of the Ristom complaints, as well as to deliberate on his own complaint against Park. 7 Rec. 1395. Baca worked with the same firm (Investors) as Ristom, who filed the first two complaints against Mr. Park. 14 Rec. 1255-58. Baca, acting in his official capacity as an officer of the Board, admitted there were members of the PSC who were trying to put Park out of business, 11 Rec. 408, told Park that the "odds were stacked against him" on the PSC, and admitted that the reason was "not of how you worked but what you charge is, what it is." 11 Rec. 409. According to Baca, had it not been for Park's pricing practice, the complaints would never have been filed, 11 Rec. 4310.

Once it is established that an association wields market power in setting or enforcing industry standards, arbitrary application of those standards, or the lack of minimal due process, give rise to antitrust liability. See: *Radiant Burners v. Peoples Light and Gas Co.*, 364 U.S. 656 (1961); *Silver v. N.Y.S.E.*, 373 U.S. 341, at 361-63 (1962); *Moore v. Boating Industry Association*, 754 F.2d 698, at 713 (7th Cir. 1985). The Board arbitrarily applied industry standards and denied minimal due process to Park. The actions of the PSC and Board attorney, Ainsa, were done with both actual and apparent authority, and satisfy the test of liability by the Board under *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 458 U.S. 1116 (1982). The Board thus directly participated in the boycott. It also condoned boycott actions by taking inconsistent and discriminatory positions regarding the commission changes.

There was ample evidence to sustain the trial court judgment against the Board, and this Application should be granted to correct the error of the Court of Appeals in rendering judgment to the contrary.

II. The trial court complied with the co-conspirator evidence rule, and no error resulted in charging the jury to again determine admissibility of the evidence.

At the close of the trial, Defendants requested that the trial court instruct the jury not to consider "any of the hearsay statements of alleged co-conspirators," 25 Rec. 3731, relying on the rule established by *United States v. James*, 590 F.2d 575, 582-83 (5th Cir. 1979) (*en banc*), cert. denied, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979). In response, the trial court recognized the *James* rule and stated:

> ". . . I agree with you that the Court is required at this time to make a finding on that matter, and I will make a finding from the evidence presented in the case that there is a *prima facia* case shown, No. 1, of the existence of a conspiracy, and No. 2, of the membership of the defendants on trial and other co-conspirators in it, *and* [3] *that there is sufficient evidence to go to the jury on that for their decision.*" 25 Rec. 3733.

The trial court's ruling comprehends the necessary findings under the *James* test. See: *United States v. Winship*, 724 F.2d 1116, 1121-22 (5th Cir. 1984).

In the Court's charge, the jury was instructed to determine from a preponderance of the independent, non-hearsay evidence whether a conspiracy existed, whether the particular declarant was a member of the conspiracy, and whether the offered statements were made in the course and furtherance of the conspiracy. 25 Rec. 3883. The Court of Appeals concluded that the trial court thus

shifted the burden of determining admissibility to the jury and had, in effect, applied the "now defunct" rule of *United States v. Apollo*, 476 F.2d 156 (5th Cir. 1973).

There was no reversible error in the trial court's handling of the co-conspirator testimony, and certainly no harm resulted. The Court of Appeals conceded that the evidence was such that the "preponderance" determination could properly be made by the trial court as to all co-conspirator statements in question, but held that the trial court, not the jury, should have made the determination required by *James* and Rule 801(d)(2)(E). The trial court did, in fact, make the determination, then required the jury to make it again. Any possible harm resulting from that process was to the Plaintiff. Precisely the same situation was presented in *United States v. Chaney*, 662 F.2d 1148 (5th Cir., Unit B, 1981) and *United States v. Monaco*, 702 F.2d 860 (11th Cir. 1983), and substantially the same circumstances occurred in *United States v. Whitley*, 670 F.2d 617 (1982). In each case, claims of prejudicial error were rejected. In *Chaney*, the Fifth Circuit stated at 1154:

> ". . . as we noted in *United States v. Noll*, 600 F.2d 1123 (5th Cir. 1979), when a jury is instructed about the admissibility of a co-conspirator's statements, the government is essentially 'required to demonstrate twice the admissibility of the [evidence], once to the court . . . and once to the jury . . . .' *Id.* at 1128. The appellant, having been given two bites at the apple, was afforded greater protection than required under *James* and therefore was not prejudiced by the instruction."

Here, however, the Court of Appeals has given the Defendants two bites at the apple. This conflicts with its prior decisions, and with that of the Eleventh Circuit Court of Appeals requiring that this Petition be granted to correct manifest injustice.

III. Damages were properly proved.

The Court of Appeals concedes that damages in an antitrust case lie in "the realm of the imprecise and the uncertain." Nevertheless, the Court faults the Plaintiff's expert's opinion because of its assumptions of market penetration and profit rate.

The opinion as to market penetration was based on growth rate during a period in which Park suffered a smaller degree of molestation. In making this determination, the probable competitive response from the Defendants was derived from their long history of adherence to uniform pricing and previous lack of competitive response. The economic behavior of the Defendants was that of a closely enforced cartel. In questioning the expert's forecast of market penetration by Park, the Court of Appeals assumed pure competitive behavior by the Defendants. Such an assumption is not justified, even in the absence of anti-competitive conduct. The El Paso realtors® would have faced a serious loss of profits by meeting or even approaching the fees charged by Park. Even by cutting their fees in half, they would still be above Park, and would allow him to further penetrate the market, though at a slower rate. There would be no need for such a drastic reduction, because they could retain the dominant share of the market (70-80%) without doing so.

Realtors® typically justify their pricing posture by arguing valid "price-leadership," i.e., independent determination that it is in their best interest to follow pricing decisions of certain "barometer" firms. Given the tenacity of El Paso realtors® to maintain the 7% commission level, the "price-leadership" format used by the expert to evaluate competitive response is more logical and proper than that of pure competitive response. It is the most prob-

able market structure that would exist in the absence of cartel, and the most probable manner in which competition from Park would be met.

The profit rate was based on Mr. Park's actual figures. To say that Plaintiff's expert did not take into account growth factors, increased expenses, etc., is to deny the record.

It was for the jury to determine whether the calculations in the damage "model" were flawed and, if so, to what extent. The factors noted by the Court of Appeals, and many more, were thoroughly aired in attacks on the expert's calculations during trial. The jury was entitled to "make a just and reasonable estimate of damages based on relevant data". *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, at 264 (1946). The opinion of the Court of Appeals does violence to the principles of *Bigelow* and *Paterson Parchment Paper Co. v. Story Parchment Co.*, 328 U.S. 551, 561 (1931). For this reason, this Petition should be granted.

IV. Judgment should have been entered against Defendants found guilty of price-fixing.

The trial court asked the jury to determine whether Defendants were guilty of price-fixing (interrogatory 1, 25 Rec. 3892), whether the Defendants combined or conspired to boycott the Plaintiff (interrogatory 2, 25 Rec. 3893), whether the combination or conspiracy found occurred in or had a substantial effect on commerce (interrogatory 3, 25 Rec. 3893), and whether "the combination or conspiracy" proximately caused injury to Plaintiff's business or property (interrogatory 4, 25 Rec. 3893). Interrogatories 3 and 4 were conditioned on a "yes" answer as to any one or more of the Defendants in response to either interrogatory 1 or 2, or both. 25 Rec. 3893.

The trial court entered judgment only against those Defendants found to be members of both conspiracies. 8 Rec. at 2087. The Court of Appeals interpreted this as an implicit finding that Plaintiff suffered no injury by reason of the price-fixing conspiracy. It was not. It was an express holding that the boycott was designed to effectuate the price-fixing and therefore only those Defendants found guilty of both price-fixing and boycott could be held liable for damages. Under the trial court's express ruling (25 Rec. 3893), the four issues comprehended the submission of a single theory of recovery, rather than a disjunctive submission of two theories of recovery.

The submission was, in fact, disjunctive. The jury made a finding of causation in response to an interrogatory which comprehended *both* the price-fixing and the boycott conspiracies. Judgment should have been entered against all Defendants or new trial should be entered as to all Defendants not found guilty of both conspiracies, on the basis that the situation is comparable to that in which there is no way to know that an invalid claim was not the sole basis for a jury verdict. See: *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 662 (1st Cir. 1981); *Morrissey v. National Maritime Union of America*, 544 F.2d 19, 26, 27 (2nd Cir. 1976); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962); *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 79 (1907).

The Court of Appeals also misconceived Park's theory of damage causation. Park did not contend that the artificially high commission directly caused injury to him. Indeed, had it not been for the predatory actions of the Defendants, their pricing practices would have resulted in the garnering of a greater market share by Park. Instead,

Park complained of and proved overt acts by each of the Defendants designed to effectuate and preserve the price-fixing by eliminating him from the market, or coercing him into complying with the established commission rates. Accordingly, judgment should have been entered against all Defendants, or new trial should have been ordered as to those not found guilty of both conspiracies, and this Petition should be granted in order to correct this error.

—o—

CONCLUSION

For the reasons set forth above, it is respectfully requested that this Petition be granted.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER-PLAINTIFF

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

EP-78-CA-156

JOHN R. (BOB) PARK, d/b/a
ACTION REAL ESTATE,

Plaintiffs,

v.

EL PASO BOARD OF REALTORS, ET AL.,

Defendants.

J U D G M E N T

(Filed December 23, 1983)

On the 25th day of October, 1982, came on to be heard the above-styled and numbered cause. All parties appeared in person and by counsel and announced ready for trial; a jury was duly selected, empaneled, and sworn, and the parties proceeded to present evidence.

At the time Plainitff rested his case, the Defendants moved for directed verdicts on behalf of all Defendants. The Court, having considered the evidence and the arguments of counsel, granted the motions for directed verdict of the following Defendants:

Mary G. Aguilar
Jorge Sierra
Marius J. Chanson, III
Charles J. Landrie, Jr.
George Hinojosa
Patricia A. Fulton

The other motions for directed verdict were denied, and the remaining Defendants proceeded with the presentation of their evidence. After the close of all the evidence, the arguments of counsel, and the charge of the Court, the jury retired to deliberate on November 17, 1982, and on November 19, 1982, returned the following verdict:

VERDICT ON SPECIAL INTERROGATORIES

We, the jury, unanimously answer the interrogatories submitted by the Court as follows:

Interrogatory No. 1

Do you find from a preponderance of the evidence that any of the following Defendants combined or conspired to unreasonably restrain trade in violation of the antitrust laws by fixing the amount charged for real estate commissions in El Paso, Texas?

Answer "Yes" or "No" as to each Defendant.

Defendant	We Answer:
El Paso Board of Realtors	YES
Donald M. Love, Jr.	YES
E. Dempsey Gunaca	YES
Mark I Realty, Inc.	YES
Bruce B. Shields	YES
Raymond Baca	YES
Elaine Achez	YES
Wayne L. Moorhead	YES
Moorhead, Inc.	YES
Cecil D. Clark	YES
C & H Realty, Inc.	YES
Ralph K. Tutor	YES

Interrogatory No. 2

Do you find from a preponderance of the evidence that any of the following Defendants conspired or com-

bined to boycott the Plaintiff for the purpose of excluding him from business or forcing him to change his commission practices?

Answer "Yes" or "No" as to each Defendant.

Defendant	We Answer:
El Paso Board of Realtors	YES
Donald M. Love, Jr.	YES
E. Dempsey Gunaca	NO
Mark I Realty, Inc.	YES
Bruce B. Shields	NO
Raymond Baca	NO
Elaine Achez	YES
Wayne L. Moorhead	NO
Moorhead, Inc.	YES
Cecil D. Clark	NO
C & H Realty, Inc.	YES
Ralph K. Tutor	NO

If your answers were "Yes" in Interrogatories 1 or 2 as to and Defendants, then answer Interrogatories numbered 3 and 4.

Interrogatory No. 3

Do you find from a preponderance of the evidence that the combination or conspiracy found occurred in or had a substantial effect on interstate commerce

Answer "Yes" or "No."

We answer: YES

Interrogatory No. 4

Do you find from a preponderance of the evidence that Plaintiff sustained any injury to his business or property which was directly and proximately caused by the combination or conspiracy?

Answer "Yes" or "No."

We answer: YES

If you have answered Interrogatory No. 4 "Yes," then answer Interrogatory No. 5.

Interrogatory No. 5

What amount of money, if paid now in cash, would reasonably compensate the Plaintiff for the damages, if any, proximately caused to Plaintiff's business or property by the combination or conspiracy?

Answer in dollars and cents.

We answer: $927,559.00

Date: November 19, 1982

/s/ Albino Garcia, Jr.
Foreman

The Court received the verdict and ordered it filed, and hereby renders judgment in accordance with the verdict of the jury.

It is ORDERED, ADJUDGED and DECREED that Plaintiff John R. (Bob) Park, d/b/a Action Real Estate, do have and recover of and from the Defendants, El Paso Board of Realtors, Donald M. Love, Jr., Mark I Realty, Inc., Elaine Achez, Moorhead, Inc., and C & H Realty, Inc., jointly and severally, in the amount of TWO MILLION SEVEN HUNDRED EIGHTY-TWO THOUSAND SIX HUNDRED SEVENTY-SEVEN and NO/100 ($2,782,677.00) DOLLARS, less the pretrial settlement amount of TWO HUNDRED NINETY-FIVE THOUSAND and NO/100 ($295,000) DOLLARS, for a net recovery of TWO MILLION FOUR HUNDRED EIGHTY-SEVEN THOU-

SAND SIX HUNDRED SEVENTY-SEVEN and NO/100 ($2,487,677.00) DOLLARS, with interest at the legal rate from the date of this judgment until paid, plus costs of suit, for all of which let execution issue.

It is further ORDERED, ADJUDGED and DECREED that Plaintiff do have and recover from Defendants El Paso Board of Realtors, Donald M. Love, Jr., Mark I Realty, Inc., Elaine Achez, Moorhead, Inc., and C & H Realty, Inc., reasonable attorneys' fees to be set by the Court.

It is further ORDERED, ADJUDGED and DECREED that judgment be, and it is hereby, entered in favor of Defendants Mary G. Aguilar, Jorge Sierra, Marius J. Chanson, III, Charles J. Landrie, Jr., George Hinojosa, Patricia A. Fulton, E. Dempsey Gunaca, Bruce B. Shields, Raymond Baca, Wayne L. Moorhead, Cecil D. Clark, and Ralph K. Tutor; that Plaintiff take nothing by his suit against these Defendants; and that they recover from Plaintiff their costs of suit herein expended.

SIGNED AND ENTERED this 23d day of December, 1982.

/s/ Harry Lee Hudspeth
UNITED STATES DISTRICT JUDGE

APPENDIX B

CORRECTED

John R. (Bob) PARK d/b/a Action Real Estate.
Plaintiff-Appellee Cross Appellant,

v.

EL PASO BOARD OF REALTORS, et al.,

Defendants-Appellants,

and

E. Dempsey Gunaca, et al.,
Defendants-Cross Appellees.

No. 83-1149

United States Court of Appeals, Fifth Circuit.

Filed Sep 3, 1985
June 24, 1985.

Real estate broker filed suit against city board of Realtors and 68 realty companies alleging that defendants, in retaliation for his attempts to cut real estate commissions, conspired to beyond him and engaged in a price-fixing conspiracy. The United States District Court for the Western District of Texas, Harry Lee Hudspeth, J., entered judgments against board of Realtors and five realty companies on the conspiracy claim, and awarded broker treble damages of $2,487,677. Board and two companies appealed. Broker cross-appealed from court's refusal to enter judgment against six companies who were found liable only for price-fixing on ground price-fixing conspiracy had not injured plaintiff. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) evidence was sufficient to sustain jury findings of conspiracy to boycott; (2) evidence of parallel conduct on part of defend-

ants, while not conclusive on issue of existence of conspiracy, at least presented a jury question; (3) jury's verdict against board of Realtors was not supported by substantial evidence; (4) evidence was sufficient to support jury finding that two realty companies participated in boycott conspiracy; (5) trial court erred in admitting hearsay statements of alleged co-conspirators without determining by preponderance of the evidence whether broker established necessary predicate for admission of such hearsay statements, and error was not harmless; (6) court properly declined to apply exclusionary rule to taped telephone conversations between broker or his daughter and other brokers; (7) award of $927,559 in damages for lost profits did not have a rational basis; and (8) finding that broker was not injured by price-fixing conspiracy was not clearly erroneous.

Reversed and rendered in part; reversed and remanded in part for new trial.

1. Monopolies 28(7.1)

To establish liability for a boycott conspiracy under section 1 of the Sherman Anti-Trust Act and section 4 of the Clayton Act, a plaintiff must prove: that conspiracy to boycott existed; that defendants participated in conspiracy; that the conspiracy had a sufficient nexus with interstate commerce; that the conspiracy injured plaintiff; and the approximate amount of damages. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1, Clayton Act, § 4, 15 U.S.C.A. § 15.

2. Federal Courts 846

In reviewing claim that evidence is insufficient to support verdict, Court of Appeals applies deferential

standards; if there is "substantial evidence" in support of the jury verdict, i.e., evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, jury verdict must be upheld.

See publication Words and Phrases for other judicial constructions and definitions.

3. Monopolies 28(7.4)

Evidence in antitrust action brought by real estate broker who alleged that other brokers, in retaliation for his attempts to cut real estate commissions, conspired to boycott his brokerage, including fact that other brokers discriminated against him and interferred with his attempts to charge a fixed commission, was sufficient to sustain jury findings of conspiracy to boycott.

4. Monopolies 28(7.4)

Although, as part of a larger case, evidence of consciously parallel business behavior is circumstantial evidence from which a conspiracy to boycott can be inferred, standing alone, it has no significant probative force where defendants can fully explain how their independent business judgment would have led to such behavior.

5. Monopolies 28(7.1)

Unless an antitrust plaintiff offers evidence that tends to exclude possibility that defendants were acting independently, an inference of conspiracy is unreasonable.

6. Monopolies 28(8)

In order to present a jury question regarding existence of a conspiracy, an antitrust plaintiff must establish

not merely consciously parallel action but a "plus factor" that indicates agreement; however, once plaintiff has met this initial burden, i.e., once he has established a setting that bespeaks accord, then consciously parallel action is probative of existence of a conspiracy whether or not it is potentially explicable in terms of actor's self-interest; it is up to jury to determine which explanation of the parallel action to accept: the explanation in terms of conspiracy or in terms of independent business judgment.

7. Monopolies 28(8)

In antitrust action by real estate broker against fellow brokers based on allegation that other brokers conspired to boycott him because of his attempts to cut commissions, evidence of parallel conduct on part of defendants, although not conclusive on issue of existence of a conspiracy, at least presented a jury question, where broker established that there was a setting where common actions bespoke accord.

8. Monopolies 28(7.4)

Evidence in antitrust action brought by real estate broker who alleged that other brokers conspired to boycott his brokerage in retaliation for his attempts to cut real estate commissions was insufficient to support jury's verdict that city board of Realtors parfticipated in boycott conspiracy notwithstanding broker's claim that board's adjudication of complaints against broker and his promulgation of prior offense rule directed at him constituted participation in the conspiracy.

9. Monopolies 28(7.5)

Evidence in antitrust action brought by real estate broker who alleged that other brokers in retaliation for

his attempts to cut real estate commissions, conspired to boycott him, including statements by sales people, was sufficient to support jury verdict against two realty companies.

10. Commerce 62.10

Antitrust plaintiff need not demonstrate that the defendant's unlawful conduct itself had an effect on interstate commerce but need demonstrate only a substantial effect on interstate commerce generated by defendant's activity in general.

11. Commerce 62.14

Real estate broker who brought antitrust action against other brokers, alleging they participated in a boycott against him in retaliation for his attempts to cut real estate commissions, introduced sufficient evidence that defendant brokers had significant effect on interstate commerce through financing of real estate loans, furnishing of title insurance, and advertising of properties for sale.

12. Commerce 62.10

In a conspiracy case, antitrust plaintiff need not show that business of each individual member of conspiracy had a substantial effect on interstate commerce, as long a conspirators in general had such an effect.

Real estate broker who brought antitrust action against other brokers.

13. Monopolies 28(7.6)

Real estate broker who brought antitrust action against other brokers for conspiring to boycott him, in retaliation for his attempts to cut real estate commissions, adequately established fact of injury, where broker presented evidence that he would have attracted more listings, sold more properties, and earned more profits had boycott not existed; moreover, broker did not need to prove that he had been injured by any particular instance of a refusal to deal.

14. Evidence 260

Federal Civil Procedure 2015, 2284

Trial court's decision not to make factual finding regarding existence of anti-trust conspiracy and related findings necessary as predicate for admission of heresay statements of alleged conspirators when hearsay statements were first offered was not error, given discretion conferred on trial courts in civil cases to control order of proof; court could properly allow evidence to be introduced subject to it later being connected up.

15. Evidence 260

Trial court in antitrust conspiracy case erred in applying defunct rule regarding prima facie case of existence of conspiracy, rather than by determining by preponderance of independent, nonhearsay evidence whether

plaintiff had established requisite predicate for admission of hearsay statements of alleged coconspirators; moreover, because hearsay statements of alleged coconspirators constituted a large proportion of plaintiff's evidence, and because predicate was not established, error was not harmless.

16. Evidence 154

Trial court in antitrust action based on allegation that real estate broker conspired to boycott broker in retaliation for his attempt to cut real estate commissions by employing a flat-fee commission system did not err in admitting into evidence various taped telephone conversations between broker or his daughter and other brokers in which broker and daughter posed as prospective sellers and attempted to elicit from other realtors comments concerning their brokerage and its flat-fee commission system, notwithstanding claim that tapes were deceptively obtained and violated local telephone tariff requiring use of beeper when taping a telephone call; where evidence is obtained in violation, at most, of a local telephone tariff, public interest in deterrence does not outweight benefit of providing fact finder with all relevant testimony.

17. Telecommunications 495

Taping telephone conversations to preserve evidence for a civil trial is not an "injurious act" within meaning of section of Omnibus Crime Control and Safe Streets Act [18 U.S.A. § 2511(2)(d)] providing an explicit exception to general rule prohibiting interception of telephone conversations where one of the parties to the con-

versation consents to the interception and purpose of interception is not to commit any criminal, tortious, or other injurious act.

See publication Words and Phrases for other judicial constructions and definitions.

18. Federal Courts 877

Court of Appeals uses a relaxed standard in reviewing a jury's award of damages in an antitrust case; once plaintiff has proved by preponderance of the evidence fact of injury, jury may use its discretion in determining exact amount of damages resulting from an antitrust violation, and its verdict may stand on less evidence that is normally required to support a damage award in civil cases.

19. Evidence 555.9

Although an expert testifying on damages in an antitrust case need not be armed on the right hand with slide rule and on the left with a computer, he cannot indulge in fantasy, and his assumptions and projections must rest on adequate basis and cannot be product of mere speculation.

20. Monopolies 28(9)

Even under relaxed burden of proof applicable to establishing amount of damages in an antitrust case, there must be a rational basis by which jury can assess amount of antitrust damages or the award cannot stand.

21. Monopolies 28(9)

An antitrust plaintiff can prove lost profits by two methods: the "before and after" method, which invoives comparing records of profits earned by plaintiff prior to

impact of violation with those subsequent to it; and the "yardstick test," which consists of studies of the profits of firms closely comparable to plaintiff's.

22. Monopolies 28(9)

Although an antitrust plaintiff is not limited to the "before and after" method or the "yardstick" test to prove amount of lost profits, but can instead use a method of proof specially tailored to individual case, he cannot engage in pure speculation.

23. Monopolies 28(9)

Jury award to antitrust plaintiff of $927,559 in damages for lost profits was not supported by substantial evidence, considering that several aspects of damages model employed by plaintiff's expert lacked a rational basis.

24. Monopolies 12(1), 28(7.2)

To establish Sherman Anti-Trust Act liability, a plaintiff need prove only that defendants conspired illegally to restrain trade; however, proof of a violation of the Sherman Act standing alone does not establish civil liability under section 4 of the Clayton Act; under section 4, there must be proof of an injury to business or property before Sherman Act violation becomes cognizable as a private civil remedy. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1; Clayton Act, § 4, 15 U.S.C.A. § 15.

25. Federal Courts 629

Because antitrust plaintiff did not object to trial court's failure to send to jury issue of whether price-fixing conspiracy injured plaintiff, he waived his right to a jury

trial regarding issue and could not object on appeal. Fed. Rules Civ.Proc.Rule 49(a), 28 U.S.C.A.

26. Federal Courts 856

In reviewing a district court's finding in antitrust action that plaintiff was not injured by price-fixing conspiracy, Court of Appeals would apply clearly erroneous standard of review.

27. Monopolies 28(7.6)

In antitrust action against real estate brokers alleging they engaged in price-fixing conspiracy against fellow broker for his attempts to cut real estate commissions, district court's finding that broker was not injured by price-fixing conspiracy was not clearly erorneous.

Appeals from the United States District Court for the Western District of Texas.

Before GOLDBERG, JOHNSON and DAVIS, Circuit Judges.

GOLDBERG, Circuit Judge:

Owning one's own home may be the great American dream, but buying it often has more the quality of a nightmare. As the record in this case reveals, the real estate business, like the Hobbesian state of nature, can be nasty, brutish, and short. While many—indeed most—real estate brokers ply their trade honestly, relying on skill and hard work to earn their daily bread, some resort to more dubious tactics to gain an advantage over their competitors. The question that this case presents is whether the admittedly dubious tactics of the defendant-brokers also violated federal antitrust law.

On August 23, 1978, John R. Park, doing business as Action Real Estate, filed suit against the El Paso Board of Realtors and sixty-eight El Paso realty companies under Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), and Section 4 of the Clayton Act, 15 U.S.C. § 15 (1982). Park alleged that the defendants, in retaliation for his attempts to cut real estate commisisons, had conspired to boycott Action Real Estate.

During the more than four ensuing years of pretrial preparation, the initial sixty-nine defendants were whittled down to eighteen.[1] Six of the remaining defendants received a directed verdict at the close of the plaintiff's evidence, leaving only twelve defendants, including the Board of Realtors, at the conclusion of the four-week trial. The jury found that all twelve of these defendants had conspired to fix prices. However, it found that only six of the defendants—the Board and five realty companies—had conspired to boycott the plaintiff. The trial court entered judgment only against these latter six defendants, on the ground that the price-fixing conspiracy had not injured the plaintiff. The court awarded the plaintiff treble damages of $2,487,677, plus interest and costs.[2]

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1. Forty-nine defendants settled with the plaintiff prior to trial for a total amount of $295,000. Apparently, this settlement covered both the present suit and a parallel class action suit brought by Park on behalf of all persons who had sold pre-owned residential real estate in El Paso County during the limitations period.

2. This award included a credit of $295,000 for the pretrial settlement.

3. Mark I Realty, Inc., and C & H Realty, Inc.

On appeal, the Board and two realty companies[3] raise numerous grounds of error.[4] They question the sufficiency of the evidence, the size of the damage award and various evidentiary rulings and jury instructions. In response, Park cross-appeals from the district court's refusal to enter judgment against the six real estate brokers who were found liable only for price-fixing.[5]

We agree with a number of the appellants' contentions. As to the Board, we find that there was insufficient evidence to support a holding of liability, and therefore reverse and render judgment on its behalf. As to the two individual realty companies, we hold that the trial court erred in admitting certain hearsay evidence and that the damage award did not have a rational basis. Therefore, with respect to these two appellants, we reverse and remand for a new trial. Finally, we reject the appellee's cross-appeal.

1. BACKGROUND

Selling a home involves bringing together two parties, an owner and a buyer. Since these parties are not always naturally drawn together like metal to a magnet, both often enlist the services of real estate brokers—the owner lists his home with a broker whose job it is to publicize

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4. Only two realty companies remain in the case, since of the five brokers against whom judgment was entered, one did not file a notice of appeal (Elaine Achez) and two have voluntarily dismissed their appeals (Moorhead, Inc., and Donald M. Love, Jr.).

5. One of these six brokers (Wayne L. Moorhead) has been dismissed from the case. The remaining five cross-appellees are E. Dempsey Gunaca, Bruce B. Shields, Raymond Baca, Cecil D. Clark, and Ralph K. Tutor.

that the house is available for sale;[6] the prospective buyer engages the services of a broker whose job it is to find houses that fit the buyer criteria. In the trade, the homeowner agent is the "listing broker" and the buyer's is the "selling broker." Although the listing and the selling brokers initially represent different parties, both are ultimately compensated on a contingency basis by the homeowner. When a sale is closed, the homeowner pays a commission to the listing broker who shares it on a predetermined basis (the "commission split") with the selling broker. Typically, this commission is a percentage of the selling price of the property.

The El Paso Board of Realtors is a non-profit trade organization. At the time of trial, approximately 2000 brokers and salespeople, including the two brokers-appellants were members of the Board, roughly one half of the total number in El Paso. The principal service provided by the Board to its members is its Multiple Listing Service ("MLS"). This Service facilitates the exchange of information between listing and selling brokers, by compiling all of the listings of member brokers.[7] After obtaining a listing, member brokers are required to submit information on the property—including the sales price, the commisison, and the commisison split—to the MLS. A

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6. Under Texas law, a broker may not bring an action against a homeowner to recover a commission unless the commission agreement is in writing. Texas Real Estate License Act § 20(??? Tex.Rev.Civ.Stat.Ann. art. 6573a, § 20(5) (V??? non Supp.1985). Consequently, a real estate broker usually attempts to obtain from a property owner a written "listing agreement."

7. For a general description and discussion of multiule listing services, *see United States v. Realty Multi-List, Inc.*, 629 F. 2d 1351, 1355-???? (5th Cir.1980).

listing of property with the MLS constitutes an offer of sub-agency to other member brokers to participate in the sale. By consulting the MLS, brokers are able to determine quickly and easily what properties are on the market, the asking prices for these properties, and the commissions that they will receive for selling the properties. Approximately eighty percent of all residential resales in El Paso County are made through the Board's MLS.

John R. (Bob) Park began doing business in El Paso as Action Real Estate in 1975. Previously he had worked in El Paso as a sales person for two real estate firms and had operated real estate companies in El Paso and Denison. In contrast to the dominant practice of figuring commissions on a percetage basis. Park charged homeowners a flat fee on the theory that there is no relation between the work and expense involved in selling a home and its price. Initially, Action's flat fee was $550. Later, it was raised to $650, then to $750, and finally to $950.[8] In March of 1976, Park applied for membership with the Board and was admitted without objection. The following month he applied for membership with the MLS and was also promptly admitted. He remained a member of both the Board and the MLS for the duration of Action Real Estate's life.

Initially, Action proved highly successful. Between 1975 and 1980, Park's total sales grew from 15 to 53 to 107, with a corresponding increase in profits from $536 to $18,433. 1978, however, marked the apogee of the firm.

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8. Ultimately, Park abandoned his flat fee and began charging commissions of two percent of the sales price of the property.

In 1979 and 1980, sales fell off first to 70 and then to 51.[9] In 1982, Park sold Action Real Estate to a former employee.

The decline and fall of Action Real Estate, like the decline and fall of empires, has provoked a multitude of warring explanations. The explanation advanced by the appellants is that Park's demise was part of a general downturn in the El Paso real estate market. Sales of residential resale property in El Paso County peaked in 1978 and declined thereafter. Between 1978 and 1982, the total number of residential resale transactions handled through the MLS fell from a high of 4,301 in 1978 to an annualized figure of only 2,518 in 1982. In large part, then, Action shared the fate of many El Paso brokers.

Park, however, saw a different hand at work—not the invisible hand of the market, but the heavy hand of his fellow brokers. According to Park, El Paso brokers had long fixed commission charges. In his view, these brokers felt threatened by his flat-fee commission and had conspired to drive him out of business. He brought suit against the Board of Realtors and sixty-eight individual brokers in August of 1978, and ultimately recovered a judgment of $2,487,677, from which the Board and two realty companies now appeal.

II. SUFFICIENCY OF THE EVIDENCE

[1, 2] To establish liability for a boycott conspiracy under Section 1 of the Sherman Act and Section 4 of the

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9. Despite this drop in sales, for unexplained reasons 1980 was apparently Park's most profitable year.

Clayton Act, a plaintiff must prove: (1) that a conspiracy to boycott existed; (2) that the defendants participated in this conspiracy; (3) that the conspiracy had a sufficient nexus with interstate commerce; (4) that the conspiracy injured the plaintiff; and (5) the approximate amount of damages. The Board and the two broker-appellants challenge the sufficiency of the evidence as to each of these elements. In reviewing these claims, we apply the deferential standard of review enunciated in *Boeing Co. v. Shipman,* 411 F.2d 365 (5th Cir.1969) (en banc). If there is "substantial evidence" in support of the jury verdict—"that is, evidence of such quality and weight that reasonable and fairminded men in the exercise of impartial judgment might reach different conclusions"—then the jury verdict must be upheld. *Id.* at 374. We consider the evidence relating to the first four elements in this part and the evidence supporting the damage award in Park IV below.

A. Existence of the Boycott Conspiracy

It has been said that a conspiracy need not be hatched in the dark of the night by men in conical hats. Neither must it involve large oligopolies or multibillion dollar corporations. A conspiracy may also be perpetrated by the little man, wearing a business suit and operating in the broad light of day. Though such conspiracies may be less menacing than those of corporate leviathans, they are usually the most difficult to prove. If the antitrust laws are to be a legal command rather than a mere exhortation, we cannot require too high a standard of proof. We must strike a delicate balance between demanding too much and being content with too little.

[3] In the present case, Park introduced a variety of evidence is support of his boycott claim. First, he presented evidence of practices by other real estate brokers that discriminated against him and interfered with his attempts to charge a fixed commission. For example, other brokers, when providing purchasers for Action's listings, attempted to raise the commission fee to seven percent of the selling price, despite the fact that the MLS listing by Action clearly specified a flat-fee commission. Conversely, when Action sold listings of other realtors, these brokers sometimes attempted to impose "punitive splits": rather than splitting the commission fee on the basis advertised in the MLS (usually, fifty-fifty), they offered Action a small fixed fee. Moreover, Park introduced evidence that other brokers made disparaging remarks about Action, telling prospective customers that Action was not reputable, 14 Rec. at 1089, that it was not equitable, 14 Rec. at 1114, and that it did not do a good job in selling its listings. Homeowners who listed their properties with Action also testified that they had been harassed by anonymous telephone calls. 16 Rec. at 1521-22; 25 Rec. at 3715. Finally, Park introduced statements by other brokers to the effect that they would not show Action's listings, that they would lie to the clients that Action's listings were already sold, 14 Rec. at 1218; 15 Rec. at 1278; 25 Rec. at 3714, that they would show them only as a "last resort." 16 Rec. at 1481, or that they avoided them "like the plague," 11 Rec. at 395. In one instance, there was testimony that a real estate agent had stated that Action would not survive for long because the other brokers in El Paso were going to drive Park out of business. 14 Rec. at 1115, 1127.

We find that this evidence, if admissible, was sufficent to ssutain a jury finding of conspiracy to boycott. *Cf. Penne v. Greater Minneapolis Area Board of Realtors*, 604 F.2d 1143, 1148-49 (8th Cir. 1979) (finding similar evidence sufficient to withstand motion for summary judgment). Although it is susceptible of different interpretations—including the defendant brokers' view that they were merely competing for csutomers and attempting to receive the largest possible commissions—it was for the jury to decide which of these alternative interpretations was correct. *Southway Theatres, Inc. v. Georgia Theatre Co.*, 672 F.2d 485, 493-94 (5th Cir. 1982). Moreover, although the appellants point to evidence that other brokers sold a large number of Action's listings,[10] this argument goes merely to the weight of the evidence. It does not conclusively show that the defendants were innocent of conspiring to boycott the plaintiff.

[4-6] The appellants contend that since the plaintiff relied on evidence of parallel conduct rather than on direct evidence of a boycott conspiracy, he was required to show that this parallel conduct was not in the realtors' self-interest. This view is not without merit. Although, as part of a larger case, evidence of consciously parallel business behavior is circumstantial evidence from which a conspiracy can be inferred, standing alone, it "has no significant probative force where the defendants can fully explain how independent business judgment would have led to such

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10. Indeed, the appellants introduced evidence (1) that of the total number of Action's listings sold between 1976 and 1980, a greater number were sold by other MLS members than by Action itself, and (2) that the percentage of Action's listings sold by other MLS members was slightly higher than the average.

a refusal." *Southway Theatres*, 672 F.2d at 494; *see also Transource International v. Trinity Industries*, 725 F.2d 274, 281 (5th Cir.1984). Unless an antitrust plaintiff offers "evidence that tends to exclude the possibility that the [defendants] were acting independently," *Monsanto Co. v. Spray-Rite Service Corp.*, — U.S. —, —, 104 S.Ct. 1464, 1471, 79 L.Ed.2d 775 (1984), an inference of conspiracy is unreasonable. *Southway Theatres*, 672 F.2d at 494; *see also Theatre Enterprises v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541, 74 S.Ct. 257, 259, 98 L.Ed. 273 (1954); *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 559 (5th Cir. 1980), *cert. denied*, 454 U.S. 927, 102 S.Ct. 427, 70 L.Ed.2d 236 (1981); *Aviation Specialties, Inc. v. United Technologies Corp.*, 568 F.2d 1186, 1192 (5th Cir.1978).[11]

[7] Here, the appellants claim that given Action's low commissions, it was more lucrative for them to concentrate on selling other listings. Moreover, they claim that it was in their self-interest to attempt to raise the

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11. This is a specific instance of the general principle that "[o]ne can infer accord from common action only if it occurs in a setting which bespeaks accord." L. Sullivan, *Antitrust* 315 (1977). The fact that all people eat, drink, are occasionally merry, and die is hardly evidence of a conspiracy. In order to present a jury question regarding the existence of a conspiracy, an antitrust plaintiff must establish not merely conspiciously parallel action but a "plus factor" that indicates agreement. *Id.* at 317. Once he has met this initial burden, however—that is, once he has established a setting that bespeaks accord—then consciously parallel action is probative of the existence of a conspiracy whether or not it is potentially explicable in terms of the actor's self-interest. It is up to the jury to determine which explanation of the parallel action to accept: the explanation in terms of conspiracy or in terms of independent business judgment.

commission if they did become involved in selling an Action home and to dissuade potential clients from listing with Action. In their view, since all of these actions can be explained in terms of their individual self-interest, the plaintiff failed to meet his burden of showing that these actions were not the product of independent business decisions.

Although this argument has some force, in the present context we ultimately disagree. Here, we are not faced with evidence that the defendants merely refused to enter into an unprofitable business relationship. Instead, the plaintiff introduced evidence that other El Paso brokers had disparaged him, had attempted to discriminate against him in the division of commissions, and had interfered with his attempts to charge a flat fee. Given both the separate jury finding that a price-fixing conspiracy existed and the evidence of widespread parallel conduct, we believe that this is a setting where common action bespeaks accord. *See supra* note 11. We hold that the evidence of parallel conduct, while not conclusive on the existence of a conspiracy, at least presented a jury question.[12]

B. Participation in the Boycott Conspiracy

1. The El Paso Board of Realtors

[8] Approximately one year after establishing Action Real Estate, Park applied to be a member of the

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12. In addition, we note that, contrary to the appellants' assertion, the plaintiff did present direct evidence that a boycot conspiracy existed—in particular, he introduced statements by other brokers that the brokers in El Paso were going to drive Park out of business, 14 Rec. at 1115, and that the real estate profession regarded him as a person not to be dealt with, 14 Rec. at 1090.

Board of Realtors and was promptly admitted. Shortly thereafter, he applied for membership in the MLS and was also admitted. Park claims that despite this evidence of cooperation, the Board participated in the conspiracy to boycott his business.

In support of this claim, Park alleges that he was denied specific benefits of Board membership—in particular, the right to have commission charges split in accordance with the MLS listings, the right to be present when contracts were presented, and the right to be free of disparagment and harassment by his fellow board members. In our view, these allegations, without more, do not implicate the Board in the conspiracy. The Board is less than the sum of its parts: the fact that some members of the Board participated in the boycott conspiracy does not imply that the Board itself participated in the conspiracy. To support such an inference, Park needed to introduce evidence that the Board participated in or condoned the alleged rules violations. For example, Park could have attempted to show that he had brought ethics complaints concerning the alleged rules violations and that the Board had ignored or otherwise acted in bad faith on these complaints. Except in one instance, however, Park failed to bring any ethics complaints. In that instance, the Professional Standards Committee of the Board tentatively found in Park's favor, and referred the case to Board's Court of Ethics.[13] This conduct hardly implicates the Board in the conspiracy; indeed, it indicates the reverse.

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13. The Board stayed further action on Park's complaint as a result of the filing of the present suit.

In contrast to Park, his fellow Board members were not so reticent about bringing ethics complaints. During Park's first two years of membership in the Board, four complaints were brought against him. Park claims that the Professional Standards Committee of the Board discriminated against him in the adjudication of these complaints and thereby participated in the boycott conspiracy.

After a careful examination of the record, we do not find substantial evidence to support this charge. Of the four complaints, the Professional Standards Committee found in Park's favor in one instance, found against Park in two instances, and tentatively found against Park in the final instance but referred the complaint to the Court of Ethics for final action, where it was stayed pending the outcome of the present antitrust suit. Park did not present any evidence that other El Paso board members publicized his two ethics violations in an effort to dissuade customers from doing business with him. In the two instances where Park was found in violation of the rules, he received written reprimands by letter, but was not punished further. In one of these instances, the member who brought the complaint also received a letter of reprimand for his conduct during the transaction. Although Park strenuously objects to the Committee's findings of misconduct, he failed to present substantial evidence that the Committee acted in bad faith or abused its procedures in order to find him guilty. The only evidence presented by Park in this connection was a taped conversation with Raymond Baca, the Vice-Chairman of the Committee, who stated there was "no love lost" between Park and several Committee members and that the odds were "stacked against [Park]." 11 Rec. at 409. During the same con-

versation, however, Baca stated that most of the Committee members were honest and that Park had gotten a fair hearing on the complaints filed against him. *Id.* at 409-10. We do not believe that this evidence, standing alone, is sufficient to support the jury's verdict that the Board participated in the boycott conspiracy. Two reprimands do not an antitrust action make.

Finally, Park argues that the Committee's adoption of a prior offense rule in March of 1978 was specifically directed against him and was designed to force him from the Board. Under this rule, board members who had committed two or more prior ethical violations could have their cases sent to the Court of Ethics for possible suspension or expulsion from the Board. Pursuant to this rule, the Committee referred the fourth complaint brought against Park to the Court for further proceedings, since Park had been found guilty of two previous ethical infractions. The Court, however, did not take any further action against Park, but instead stayed the proceedings during the pendency of the present suit. Except for the approximate coincidence in time of the complaints brought against Park and the adoption of the prior offense rule, there is no evidence to suggest that this rule was adopted in order to force Park from the Board. Park's attempts to characterize the rule as the "Park rule," *see* Appellee's Brief at 23, are without support in the record and are pure speculation, as is his claim that had he not brought the present suit, the Court would have acted under the rule to suspend or expel him from the Board.

Because we find that the jury's verdict against the Board was not supported by sufficient evidence, we reverse

this portion of the verdict and render judgment for the Board.

2. The Realty Companies

[9] The jury also found that five realty companies had participated in the boycott conspiracy, two of which are presently before us on appeal. In contrast to the jury's verdict regarding the Board, we find that the verdict against these two appellants was supported by sufficient evidence. There is evidence in the record that a salesman for one of the comapnies told a prospective customer that he would show the customer's house "only as a last resort" if it were listed with Action. 16 Rec. at 1481. Moreover, the csutomer testified that the salesman kept Action listings at the back of his MLS listings book. *Id.* at 1480. With respect to the other company, there was testimony that one of its salespeople disparaged Action to a homeowner, telling the homeowner that Action was not going to survive for very long because the other brokers in El Paso would drive it out of business. 14 Rec. at 1114-15. Although this evidence is sparse, we believe that a reasonable jury in the exercise of impartial judgment could conclude that these two realty companies were participants in the boycott conspiracy.

C. Effect on Interstate Commerce

[10] The appellants next argue that Park failed to introduce sufficient evidence that the boycott conspiracy affected interstate commerce. We disagree. Under *McLain v. Real Estate Board of New Orleans,* 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980), an antitrust plaintiff need demonstrate only "a substantial effect on interstate

commerce generated by [the defendants'] brokerage activity." *Id.* at 242, 100 S.Ct. at 509. He need not make "the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy. . . ." *Id.* As the Supreme Court explained, "If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases." *Id.* at 243, 100 S.Ct. at 509.

[11, 12] Here, the plaintiff introduced substantial evidence that the actions of El Paso real estate brokers had a significant effect on interstate commerce through the financing of real estate loans, the furnishing of title insurance, and the advertising of properties for sale. This is precisely the kind of involvement with interstate commerce that the Court found sufficient in *McClain*. *Id.* at 245, 100 S.Ct. at 510-11. "Ultimately, whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance, those two commercial activities that on this record are shown to have occurred in interstate commerce." *Id.* at 246, 100 S.Ct. at 511. Unlike in *Alabama Homeowners v. Findahome Corp.*, 640 F.2d 670 (5th Cir. 1981), where the alleged conspiracy involved only two firms, neither of which was shown to have any involvement with interstate commerce, *id* at 674, here the conspiracy was alleged to have involved a large part of the El Paso realty market. In a conspiracy case, the plaintiff need not show that the business of each individual member of the conspiracy had a substantial effect on interstate commerce, as long as the coconspirators in general

had such an effect. This is what the jury implicitly found here.[14]

D. Fact of Injury

[13] Finally, the appellants challenge the sufficiency of the plaintiff's proof that he was in fact injured by the boycott conspiracy. As discussed below, we have serious questions regarding the amount of damages awarded by the jury; in brief, we do not believe that the jury's award of $927,559 had a reasonable basis. We think it clear, however, that the plaintiff adequately established the fact of injury. From the plaintiff's evidence, the jury was entitled to infer that the plaintiff would have attracted more listings, sold more properties, and earned more profits had the boycott not existed. This being so, the plaintiff did not need to prove that he had been injured by any particular instance of a refusal to deal.[15]

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14. The appellants also raise an objection to the form of the special interrogatory regarding interstate commerce. They claim that because the interrogatory did not distinguish between the price-fixing and the boycott conspiracies, it is possible that the jury found only that the price-fixing activities had had a substantial effect on interstate commerce. Because we reverse and remand on oher grounds, we need not consider this question here. We assume that, on remand, if the district court again submits special interrogatories, it will ask the jury specifically whether the activities affected by the boycott conspiracy had a substantial effect on interstate commerce.

15. In our view, all of the appellant's arguments regarding proof of the fact of damages relate instead to the size of the damage award. They do not show that the plaintiff did not sustain any injury.

III. EVIDENTIARY ISSUES

The appellants raise two issues relating to the admission of evidence, First, they argue that the trial court admitted evidence under the coconspirator hearsay rule, Fed. R.Evid 801(d)(2)(E), without making the required *James* findings. *See United States v. James,* 509 F.2d 575. 582-83 (5th Cir.) (en banc), *cert. denied,* 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979). Second, they argue that the trial court improperly admitted a number of taped telephone conversations that purportedly were obtained through deception and in violation of a local telephone tariff. We agree with the appellants regarding the first of these issues, and therefore reverse and remand for a new trial. Because the second issue may arise on retrial, we also consider it briefly

A. James Error

Under Fed.R.Evid. 801(d)(2)(E), evidence is not hearsay if it is offered against a party and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Although Rule 801(d)(2)(E) codified a long-standing exception to the hearsay rule, it altered the allocation of responsibility between the judge and the jury in determining whether the exception applied. Prior to the adoption of the Federal Rules, the admission of coconspiratorial hearsay was governed by the rule of *United States v. Apollo,* 476 F.2d 156 (5th Cir. 1973). The judge's role was merely to make a preliminary determination whether the proposing party had established a "prima facie case"—*i.e.,* evidence sufficient to support a finding by the jury that the conspiracy existed and that the declarant and the defendant against whom the

statement was offered were members of the conspiracy. *See United States v. Oliva,* 497 F.2d 130, 132-33 (5th Cir. 1974). If the judge made this discrimination, it was then the jury's responsibility to determine whether a conspiracy in fact existed, whether the defendant and declarant were members of the conspiracy, and whether the statement was made during the course and in furtherance of the conspiracy.

As we held in *James,* however, the adoption of the Federal Rules of Evidence in 1975, by giving the trial judge the sole responsibility for determining the admissibility of coconspiratorial hearsay, required that we overrule the *Apollo* procedures. 590 F.2d at 578-80. Because the judge now no longer shares responsibility with the jury for determining the admissibility of the evidence, it is no longer sufficient for him to make merely a preliminary determination about whether the proposing party has established a prima facie case. Instead, he must determine himself whether all of the conditions for the admission of the evidence have been met. *Id.* at 579-80. *James* counsels that, initially, the trial judge should make this determination when the hearsay evidence is offered, using a "substantial, independent evidence" standard. *Id.* at 581. Regardless, however, of whether the judge makes this preliminary determination or whether he admits the evidence subject to it later being "connected up," *James* requires that at the conclusion of all the evidence, the trial court must determine as a factual matter "whether the [proposing party] has shown *by a preponderance of the evidence* independent of the statement itself (1) that a conspiracy existed, (2) that the coconspirator and the defendant against whom the coconspirator's statement is

offered were members of the conspiracy, and (3) that the statement was made during the course and in furtherance of the conspiracy. . . . If the court concludes that the [plaintiff] has not borne its burden of proof on these issues, the statement cannot remain in the evidence to be submitted to the jury." *Id.* at 582-23 (emphasis added).

Although *James* was itself a criminal case, "the court's construction of the requirements of Rule 801(d)(2)(E) was not based upon considerations unique to criminal actions." *Paul F. Newton & Co. v. Texas Commerce Bank*, 630 F.2d 1111, 1121 (5th Cir.1980). For this reason, we have adopted the *James* rules in the civil context. *Id.* In doing so, however, we noted "that the district court's discretion in controlling the order of proof may be broader where a party seeks to introduce coconspirators' statements in a civil action rather than a criminal proceeding since the concern of avoiding any possible prejudice to a party from the admission of evidence later determined to be inadmissible is not as strong in the civil context." *Id.*

[14] Here, the trial court declined to make a *James* finding when the hearsay statements of the alleged coconspirators were offered. 5 Supp.Rec. at 167-68. Given the discretion conferred on trial courts in civil cases to control the order of proof, *Paul F. Newton*, 630 F.2d at 1121, this decision was not erroneous. The district court could properly allow the evidence to be introduced subject to it later being connected up. *United States v. Winship*, 724 F.2d 1116, 1121 (5th Cir.1984).

[15] At the conclusion of all the evidence, however, the trial court was required to determine whether the

plaintiff had established a *James* predicate by a preponderance of the independent, non-hearsay evidence. Despite motions by the defendants' counsel, the trial court failed to do so.[16] Instead, it merely determined that "there is a prima facie case shown, number one, of the existence of a conspiracy, and number two, of the membership of the Defendants on trial and other coconspirators in it, and that there is sufficient evidence to go to the jury on that for their decision." 25 Rec. at 3733. Later, the district court instructed the jury to determine from a preponderance of the independent, non-hearsay evidence, whether a conspiracy existed, whether the particular declarant was a member of the conspiracy, and whether the offered statements were made in the course and furtherance of the conspiracy. 25 Rec. at 3883. In applying the now-defunct *Apollo* rule regarding a prima facie case, rather than determining by a preponderance of the evidence whether the plaintiff had established a *James* predicate, the trial court erred.[17]

The *James* rule serves an essential function in upholding the integrity of the hearsay rule. It must not be

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16. Where the defense counsel has failed to move for a *James* ruling at the close of all the evidence, we have limited our review of the district court's actions to the plain error rule. *United States v. DeRoche*, 726 F.2d 1025, 1028 (5th Cir.1984). Here, however, the defense counsel clearly did meet its burden of requesting a *James* ruling. 25 Rec. at 3730-32.

17. The present case is thus distinguishable from *Winship*, where the trial court failed to articulate its *James* findings but implicitly applied the correct legal standard. *See Winship*, 724 F.2d at 1121-22.

banished to the purgatory of sporadic application. In the present case, because the hearsay statements of alleged coconspirators constituted a large porportion of the plaintiff's evidence, and because we do not believe that, as a matter of law, a *James* predicate was established, we cannot say that the trial court's error was harmless. Consequently, with respect to the liability of the two real estate companies, we are compelled to reverse and remand for a new trial. *See DeRoche*, 726 F.2d at 1029 (reversing and remanding for new trial due to failure to make *James* finding).

B. Deception

The appellants also argue that the trial court erroneously admitted into evidence various taped telephone conversations between Park or his daughter and other El Paso real estate brokers. In these conversations, Park and his daughter posed as prospective sellers and attempted to elicit from other brokers comments concerning Action Real Estate and its flat-fee commission system. The appellants claim that since these tapes were deceptively obtained and violated the local telephone tariff requiring the use of a beeper when taping a telephone call, they should have been excluded.

The applicability of the exclusionary rule to civil cases has been the subject of considerable controversy. *See generally Jonas v. City of Atlanta*, 647 F.2d 580, 587-88 (5th Cir.1981); *McCormick on Evidence* 370-71 (E. Clearly 2d ed. 1972). "In the complex and turbulent history of the rule, the [Supreme] Court never has applied it to exclude evidence from a civil proceding, federal or state." *United States v. Janis*, 428 U.S. 433, 447, 96 S.Ct. 3021, 3029, 49

L.Ed.2d 1046 (1976). "[W]hether the exclusionary rule may ever bar the introduction of evidence in a civil trial is uncertain." *Jonis*, 647 F.2d at 587; *see also City of Waco v. Bridges*, 710 F.2d 220, 225 (5th Cir.1983) (generally, exclusionary rule *not* applicable in civil cases), *cert. denied*, — *U.S.* —, 104 S.Ct. 1414, 79 L.Ed.2d 741 (1984).

[16, 17] In the present case, we believe that the district court properly declined to apply the exclusionary rule. Where evidence is obtained in violation, at most of a local telephone tariff, the public interest in deterrence does not outweigh the benefit of providing the factfinding with all of the relevant testimony.[18] Although some states have expressed a policy against the admisison of evidence obtained through the covert taping of telephone conversations, *see, e.g., Markham v. Markham*, 272 So.2d 813 (Fla. 1973), no similar federal policy has heretofore been expressed. Indeed, the Omnibus Crime Control and Safe Streets Act of 1968 § 802, 18 U.S.C. § 2511(2)(d) (1982), makes an explicit exception to the general rule prohibiting the interception of telephone conversations where, as here, one of the parties to the conversation consents to the interception and the purpose of the interception is not to commit any criminal, tortious, or other injurious act.[19]

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18. In this respect, the present case differs from cases where the evidence in question was obtained not merely in violation of a telephone tariff, but in violation of a party's fourth amendment rights.

19. In the present case, the plaintiff's purpose for taping the telephone conversations was to preserve evidence for trial. In our view, this purpose is not an "injurious act" within the meaning of § 2511(2)(d). *Cf. Moore v. Telfon Communica-*

(Continued on next page)

The cases cited by the appellants do not contradict this conclusion. In both *Cataphote Corp. v. Hudson*, 422 F.2d 1290 (5th Cir.1970), and *Trans-Cold Express v. Arrow Motor Transit*, 440 F.2d 1216 (7th Cir.1971), the courts merely upheld the exclusion of deceptively obtained evidence as being within the trial court's discretion. *See Cataphote Corp.*, 422 F.2d at 1296; *Trans-Cold Express*, 440 F.2d at 1219. Neither opinion suggests that had the trial court admitted the evidence, the appellate court would have reversed. Indeed, to the extent that these cases stand for the proposition that the admission of deceptively obtained evidence is within the sound discretion of the trial court, they support the view that the court below was entitled to admit the disputed tape recordings. On remand, we leave the admissibility of the tape recorded conversations to the sound discretion of the trial court.

IV. AMOUNT OF DAMAGES

After finding six of the defendants liable for conspiracy to boycott, the jury awarded the plaintiff $927,559 in damages for past and future lost profits for the period from 1978 to 1991. The appellants claim that this damage award was not supported by substantial evidence and was excessive. Because the issue may arise again on remand, we feel it appropriate to express our reservations concerning the amount awarded to the plaintiff.

(Continued from previous page)

tions Corp., 589 F.2d 959, 966 (9th Cir.1978) (Congress did not intend to prohibit recording a conservation when the purpose of the recording is to preserve evidence of extortion); *Meredith v. Gavin*, 446 F.2d 794, 799 (8th Cir.1971) (Congress intended only to prohibit use of an intercepted conversation "in a matter in which the offending party had no right to proceed").

[18] In reviewing a jury's damage award, we enter "into the realm of the imprecise and the uncertain." *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 45 (5th Cir.), *cert. denied*, 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665 (1972); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24, 89 S.Ct. 1562, 1576-77, 23 L.Ed.2d 129 (1969); *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 434 (5th Cir. 1985). "An exacting burden of proof on antitrust damages . . . would render nugatory the value of private enforcement of the antitrust laws and would reward antitrust violators for particularly egregious conduct" by which they not only violated the law but also deprived the plaintiffs of direct evidence of damages. *Id.* For this reason, we use a relaxed standard in reviewing a jury's award of damages. Once a plaintiff has proved by a preponderance of the evidence the fact of injury, a jury may use its discretion in determining the exact amount of damages resulting from the antitrust violation. *Id.* at 435; *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 989 & n. 8 (5th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 1594, 80 L.Ed.2d 126 (1984). "Under this relaxed burden, a jury verdict may stand on less evidence than is normally required to support a damage award in civil cases." *Pierce*, 753 F.2d at 435.

[19, 20] At the same time, however, we do not abdicate altogether our duty to review damage awards. Although an antitrust expert "need not be armed on the right hand with a slide rule, on the left with a computer," *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 25 (5th Cir.), *cert. dismissed*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974), he cannot indulge in "fantasy." *Id.* His assumptions and projections must rest on

"adequate bases," *id.* at 24, *quoted in Pierce*, 753 F.2d at 438, and cannot be the product of mere speculation, *Pierce*, 753 F.2d at 438. "[E]ven under a relaxed burden of proof, there must be a rational basis by which a jury can assess the amount of antitrust damages or the award cannot stand." *Multiflex*, 709 F.2d at 995.

In support of his damage claim, the plaintiff relied solely on the testimony of an expert witness, Dr. George. Dr. George calculated the plaintiff's damages by estimating how much Action Real Estate would have grown in the absence of the boycott. He theorized that the low commission prices offered by the plaintiff would have induced homeowners to list their properties with Action, that as a result Action would have captured twenty percent of the El Paso real estate market by 1983, and that the plaintiff would have realized profits of thirty percent on his total revenues.

After a careful review of Dr. George's testimony, we find that several aspects of his damages model lack a rational basis. First, Dr. George projected that due to its lower commisison charges, Action would have continued to grow until other firms began to engage in price competition. He assumed that this would have occurred when Action had captured twenty percent of the real estate resale market. 19 Rec. at 2409-11. Dr. George gave absolutely no basis, however, for these assumptions. He did not introduce evidence that homeowners base their choice of real estate brokers primarily on price, nor did he introduce evidence that the other brokers in El Paso would not have competed at an earlier point to protect their market shares, *see Household Goods Carriers' Bureau v. Terrell*, 452 F.2d 152, 160 (5th Cir.1971) (expert testimony regard-

ing market penetration relied on the "totally unsubstantiated assumption that the [defendant]would not take competitive steps" to protect its position). He did not study other real estate markets to see how they behaved, 20 Rec. at 2702, and admitted that he did not know of any real estate firm in the country that had a twenty percent market share, *id.* at 2702-03. Indeed, he was unaware of any realty firm that had larger than a six-and-one-half percent market share, the share of the largest firm in El Paso in 1979, *Id.* at 2701, 2703.[20]

Second, Dr. George estimated that the plaintiff's profit rate would have been thirty percent during the entire damages period. He calculated this figure by averaging the figures on the plaintiff's 1976 to 1980 income tax returns. Although this estimate, unlike Dr. George's estimate of market share, had at least some basis, we find that it did not have a *rational* basis. During the 1976 to to 1980 period, Action Real Estate had only a couple of salesmen, one of whom was the plaintiff. Consequently, the "profits" reported on the plaintiff's tax returns represented, in large part, a return on his labor—they were earned from sales handled by the plaintiff himself.[21] As Action Real Estate grew to a twenty percent market share, however, a smaller and smaller percentage of its sales

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20. A twenty percent market share would have made Action Real Estate the size of the largest *four* real estate firms combined in El Paso in 1980. 23 Rec. at 3328.

21. The highest profit reported by the plaintiff in any year was approximately $20,000. In view of the fact that the plaintiff claimed to be working full-time in the realty business, this "profit" is more likely to represent a return on the plaintiff's labor than a profit from sales by his subordinates.

would have been handled by the plaintiff. The relevant calculation of profit rate, therefore, is not the plaintiff's profit rate from his own sales, but his profit rate from sales handled by other salesmen. The plaintiff's expert did not make any calculation of this amount.[22]

[21] Generally, an antitrust plaintiff can prove lost profits by two methods: (1) the "before and after" method, which "involves comparing records of profits earned by the plaintiff prior to the impact of the violation with those subsequent to it;" and (2) the "yardstick test," which "consists of studies of the profits of firms closely comparable to plaintiff's." Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 Harv.L.Rev. 1566, 1574-75 (1967); *see Pierce*, 753 F.2d at 439; *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 667 (5th Cir.1974), *cert. denied*, 420 U.S. 929, 95 S.Ct. 1128, 43 L.Ed.2d 400 (1975). Here, the plaintiff's expert did not utilize either of these methods. The plaintiff's most profitable year ever was 1980, and his second most profitable year 1978, both years during which the boycott allegedly was in force. Dr. George thus could

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22. Our analysis of the logical defect in Dr. George's calculation of profit rate is confirmed by an examination of the profit rates of other real estate firms. The defendants introduced uncontradicted evidence that the average profit rate for real estate brokerage firms nationally for the 1975 to 1980 period was only five percent. 24 Rec. at 3541-42. The highest profit rate cited by the plaintiff for another brokerage firm in El Paso was twenty-six percent, and that was for only a single year, not for a sustained period. 20 Rec. at 2539. Dr. George failed to give any credible explanation of how a firm could provide roughly the same services as other firms, charge a third of the price, and earn a higher profit rate. Even were the plaintiff the Henry Ford of the realty industry, we are doubtful that he could have achieved threefold economies of scale.

not compare the plaintiff's profits before and after the violation to compute damages. But Dr. George also did not use the alternative method of studying the profits of firms most closely comparable to the plaintiff's. He did not examine the record of realty firms that charged fixed commissions either in El Paso or in other cities in order to determine their market shares and profit rates.

[22, 23] Instead, Dr. George merely "estimated" that the plaintiff's firm would capture twenty percent of the real estate resale market in El Paso and that thirty percent of the plaintiff's revenues would be profits. Although a plaintiff is not limited to the before and after method or the yardstick test of lost profits, but can instead use a method of proof "specially tailored" to the individual case, *Lehrman,* 500 F.2d at 688, he cannot engage in pure speculation. On remand, the plaintiff must present a revised damages model, with a rational basis for each of the model's principal assumptions.[23]

V. COUNTERCLAIM

[24] To establish Sherman Act liability, a plaintiff need prove only that the defendants conspired illegally to restrain trade. However, "[p]roof of a viloation of the Sherman Act standing alone does not establish civil liability under § 4 of the Clayton Act [15 U.S.C. § 15 (1982)]. There must be under § 4 be proof of 'injury to business or prop-

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23. In addition, since the exact number of residential resales in El Paso can now be determined for much of the damages period, the plaintiff should incorporate these figures into his model rather than rely on projections as he did previously. The plaintiff should also use actual figures rather than projections for the home resale inflation rate, when calculating the commissions he would have received for his lost sales.

erty' before a Sherman Act violation becomes cognizable as a private civil remedy . . . [A]wareness of the distinction between conduct which violates § 1 of the Sherman Act, and the elements which establish liability in private party litigation under § 4 of the Clayton Act, is vital." *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 987 n. 7 (5th Cir.1983) (quoting *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 317 & n. 17 (5th Cir.1978)), *cert. denied*, — U.S. —, 104 S.Ct. 1594, 80 L.Ed.2d 126 (1984).

In the present case, the district court found that the plaintiff failed to prove that he had been injured by the defendants' price-fixing conspiracy, and therefore declined to enter judgment against those defendants who were found liable only of price-fixing. The plaintiff cross-appeals from this determination, claiming that it is contrary to the jury finding of injury. We reject this cross-appeal.

The special interrogatory submitted to the jury regarding injury was far from a model of clarity. It was predicated on an affirmative response to either the price-fixing *or* the boycott interrogatory, and asked, "Do you find from a preponderance of the evidence that Plaintiff sustained any injury to his business or property which was directly and proximately caused by the combination or conspiracy?" 8 Rec. at 2083. Because it did not require the jury to specify which conspiracy had injured the plaintiff, it is possible that the jury, in answering the interrogatory affirmatively, believed that only the boycott conspiracy had injured the plaintiff.

[25] Under Rule 49(a) of the Federal Rules of Civil Procedure, if the trial court, when submitting special in-

terrogatories to the jury, "omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury." Here, the trial court omitted sending to the jury the issue of whether the price-fixing conspiracy, in particular, injured the plaintiff. Because the plaintiff did not object to this omission, *see* 25 Rec. at 3735-36, he waived his right to a jury trial regarding the issue and cannot now object on appeal. *J.C. Motor Lines v. Trailways Bus System,* 689 F.2d 599, 602 (5th Cir.1982).

When an issue is not submitted to the jury, the trial court may make a finding regarding that issue. Fed.R. Civ.P. 49(a). "[I]f it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict." *Id.* Here, the district court implicitly made a finding that the price-fixing conspiracy did not injure the plaintiff. It stated, "Plaintiff's evidence with respect to damages . . . was that his lost profits and the ultimate loss of his entire business were caused by the boycott in which the Defendants were alleged to have engaged. He is therefore entitled to antitrust damages only against those Defendants found by the jury to be members of *both* conspiracies; *i.e.,* to fix commissions and to boycott the Plaintiff." 8 Rec. at 2087.

[26, 27] In reviewing the district court's finding that the plaintiff was not injured by the price-fixing conspiracy, we apply the clearly erroneous standard of review, *J.C. Motor Lines,* 689 F.2d at 602; *Murtagh v. University Computing Co.,* 490 F.2d 810, 817 (5th Cir.), *cert. denied,* 419 U.S. 835, 95 S.Ct. 62, 42 L.Ed.2d 62 (1974), and uphold the district court's finding. The plaintiff alleged that the

defendant brokers set an artificially high price for commissions. However, it is difficult to see how this price-fixing, in itself, could have injured the plaintiff. Setting an artifically high price for a product potentially harms Consumers: but normally one would not expect it to harm competitors who try to undercut the set price. Quite the reverse: price fixing ordinarily helps these competitiors by allowing them to capture a larger share of the market than they would if the prevailing price were lower. *See Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 852 (5th Cir.), *cert. denied*, 454 U.S. 1125, 102 S.Ct. 975, 71 L.Ed.2d 113 (1981); Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 Harv.L.Rev. 1566, 1573 (1967) ("[P]roof of conspiracy fixing resale prices in the indsutry might suggest that a plaintiff retailer benefited from the artificially inflated prices."). This was indeed one of the bases of Dr. George's assumption that the plaintiff should have captured a twenty percent market share. While we do not hold that a plaintiff might not be able to show, in certain instances, that he was hurt by the price-fixing conspiracy of his competitors, we do not believe that the plaintiff has done this here.

Because we do not disturb the district court's implied finding that the price-fixing conspiracy did not injure the plaintiff, we hold that the district court properly refused to enter judgment against the six defendants who were exonerated of the boycott conspiracy.

VI. CONCLUSION

Generally, we are reluctant to disturb a jury verdict, particularly one that is the product of a four-week trial.

This case, however, proves that even the most sacrosanct of presumptions has its exceptions. After combing a voluminous record, we are left with the conviction that the jury's verdict was deficient in two respects: There was inadequate evidence that the Board participated in the boycott conspiracy and that the conspiracy caused the plaintiff nearly one million dollars in damages. In addition, we find that the trial court improperly admitted out-of-court statements by alleged coconspirators without making the required *James* findings. We therefore reverse and render judgment for the Board, and reverse and remand for a new trial for the two broker-appellants.

REVERSED AND RENDERED IN PART AND REVERSED AND REMANDED IN PART FOR A NEW TRIAL.

A true copy 8/26/85

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ A. S. Rondeno
Deputy

New Orleans, Louisiana

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1149

D. C. Docket No. EP-78-CA-156

John R. (Bob) PARK d/b/a
Action Real Estate,
Plaintiff-Appellee Cross Appellant,

v.

EL PASO BOARD OF REALTORS, et al.,
Defendants-Appellants,

and

E. Dempsey Gunaca, et al.,
Defendants-Cross Appellees.

Appeals from the United States District Court for the Western District of Texas

Before GOLDBERG, JOHNSON, and DAVIS, Circuit Judges.

J U D G M E N T
(Filed September 3, 1985)

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed and rendered in part and reversed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that costs on appeal are taxed against plaintiff-appellee.

June 24, 1985

ISSUED AS MANDATE: August 26, 1985

A true copy 8/26/85

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ A. S. Rondeno
Deputy

New Orleans, Louisiana

OP-JDT-14